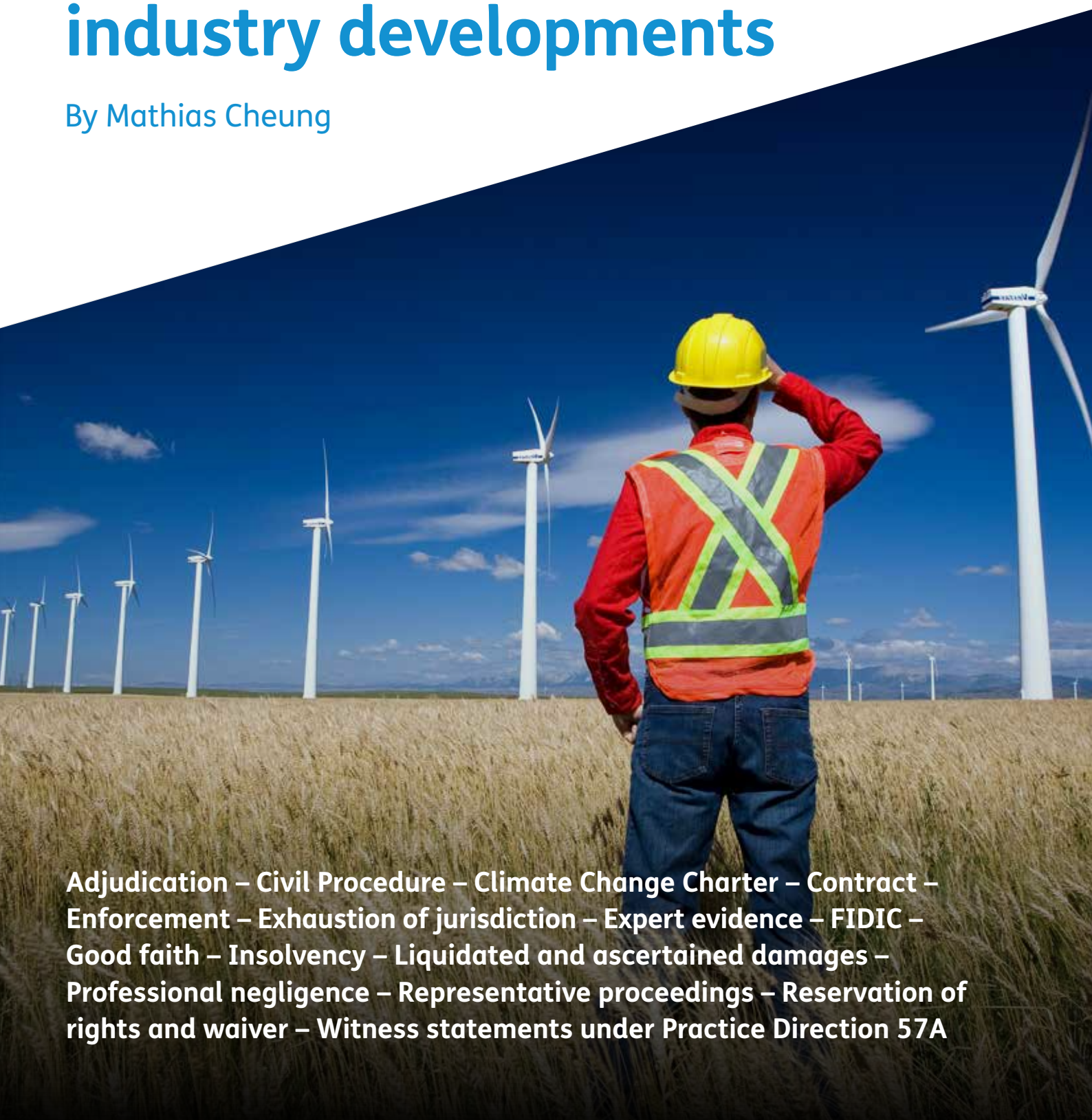
Construction law in 2021: a review of key legal and industry developments

By Mathias Cheung



Adjudication – Civil Procedure – Climate Change Charter – Contract – Enforcement – Exhaustion of jurisdiction – Expert evidence – FIDIC – Good faith – Insolvency – Liquidated and ascertained damages – Professional negligence – Representative proceedings – Reservation of rights and waiver – Witness statements under Practice Direction 57A

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Maritime and Commercial Law

CONTENTS

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Mathias Cheung is a barrister at Atkin Chambers. His practice covers all areas of Chambers' work, including construction, engineering and infrastructure, energy and utilities, information technology, professional negligence and international arbitration. In addition to frequent appearances in the Technology and Construction Court in complex construction, infrastructure and energy disputes, he has also acted successfully in numerous adjudications relating to payment disputes, delay claims and private finance initiative projects.

Mathias' recent reported cases include *Vinci Construction UK Ltd v Beumer Group UK Ltd* [2018] BLR 575, *DBE Energy Ltd v Biogas Products Ltd* [2020] EWHC 1232 (TCC) and *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others* [2020] BLR 747. His recent international experience includes a public inquiry into alleged defective steelwork in a high-profile railway project in Hong Kong SAR, China, an ongoing ICC arbitration relating to a combined cycle power plant in the Caribbean, and an ongoing SIAC arbitration concerning a high-rise development in Cambodia.

Mathias is ranked as a leading junior in Construction and Energy in Chambers & Partners (UK and Global) and Legal 500 (London Bar and Asia Pacific), and has been described as "head and shoulders one of the best juniors at the Bar". He is also the winner of the SCL Hudson Prize 2015 for his essay entitled "Shylock's Construction Law: the Brave New Life of Liquidated Damages?", and has been published in a number of journals including the *International Construction Law Review*.

Construction law in 2021: key legal and industry developments

By Mathias Cheung

This article summarises some of the key legal and industry developments in construction law in 2021 (both in the UK and abroad).[1] Over the course of 2021, as the UK emerged from the shadow of national lockdowns, the legal and construction industries experienced a gradual return to normality, and the courts continued to hand down numerous thought-provoking decisions. The last month of the year saw the surge of the Omicron coronavirus variant, which all but confirmed that Covid-19 was here to stay, and we would have to brace ourselves for challenges both old and new in the year ahead.

It is no secret that the Covid-19 pandemic was an ongoing cause of global disruption throughout the year 2021, as the world continued learning to co-exist with, and outsmart, the virus. Fortunately, the construction and legal industries as a whole were quick to transition to new ways of working, by harnessing the available technology where practicable, and carrying on in person with suitable social distancing measures where necessary.

In particular, the Business and Property Courts took proactive steps to ensure that dispute resolution could by and large continue in a "business as usual" manner. The Master of the Rolls, Sir Geoffrey Vos, recognised this in a speech in June 2021 to the London School of Economics:

> "In England and Wales, the civil courts were relatively quick to adopt remote working for most types of case allowing proceedings to continue to be determined whilst lockdown and social distancing measures were in place. The Business and Property Courts, in particular, hardly missed a beat. They continued hearing interlocutory matters and final trials from a very early stage using Skype for Business and then Teams."[2]

Thanks to the English Courts' ability to adapt and evolve quickly, the steady flow of civil cases continued throughout the year despite the many and varied obstacles. The courts also seized the momentum to improve the way in which disputes were resolved, from a renewed focus on the contents of witness statements, to the increasing use of online dispute resolution. This was only the beginning of much more radical reform, and it will be exciting to watch this important period in legal history unfold.

The Technology and Construction Court (TCC) played an important part in this wider movement – pressing on with a combination of remote, in-person and hybrid hearings – culminating in another prolific year of interesting and thought-provoking judgments on all aspects of construction law, ranging from adjudications to contractual interpretation. With a few much-anticipated judgments from the Court of Appeal and the Supreme Court added into the mix, the result was another remarkable year of legal developments in an ever-changing landscape.

This latest annual overview of the key legal developments across different jurisdictions aims to provide some clarity on the important legal questions of the day, while bringing into perspective some of the everyday conundrums which are faced by the construction and infrastructure industries in the UK and around the world.

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1 See also Cheung, M, *Construction law in 2017: a review of key legal and industry developments*; Cheung, M, *Construction law in 2018: a review of key legal and industry developments*; Cheung, M, *Construction law in 2019: a review of key legal and industry developments*; and Cheung, M, *Construction law in 2020: a review of key legal and industry developments* (Informa Law 2017–2021).

2 Sir Geoffrey Vos, "London International Disputes Week 2021: Keynote Speech" (delivered virtually on 10 May 2021).

CHALLENGES POSED BY THE COVID-19 PANDEMIC

Force majeure

The term "force majeure" has probably been invoked more than any other legal phrase over the past year or two, in light of what many consider to be the unforeseen or unforeseeable impact of Covid-19 on day-to-day business. In contrast, the number of disputes regarding force majeure clauses which have reached the courts are perhaps less than one might expect, most likely because parties often settle on an amicable and commercial way forward without requiring the courts' final determination in these somewhat difficult circumstances.

Having said that, there were a number of instructive decisions from various common law jurisdictions during 2021, which provide helpful illustrations of how force majeure clauses apply to the current pandemic. Starting with the English courts, in *Dwyer (UK Franchising) Ltd v Fredbar Ltd and Mr Shaun Rowland Bartlett*,[3] the court had to consider whether a franchise agreement for the "Drain Doctor" plumbing and drain repair services franchise had been validly terminated.

> The term "force majeure" has probably been invoked more than any other legal phrase over the past year or two, in light of what many consider to be the unforeseen or unforeseeable impact of Covid-19 on day-to-day business

One of the key issues in this case was whether Dwyer repudiated the contract by failing to properly consider Fredbar's invocation of the force majeure clause to suspend works. Fredbar's request for suspension relied on the impact of Covid-19 on Fredbar's turnover, as well as the advice from the NHS that Mr Bartlett (Fredbar's sole owner) should self-isolate to protect his vulnerable son from the virus.

Insolvency and Companies Court Judge Jones applied the Supreme Court's decision in *Braganza v BP Shipping Ltd and Another (The British Unity)*[4] and held that "... there was an implied term for [the force majeure clause] that the power of designation must be exercised honestly, in good faith and genuinely. It must not be exercised arbitrarily, capriciously, perversely or irrationally", and that Dwyer's exercise of that power "... must have taken account of the matters which are relevant and ought to be taken into account and not have taken into consideration those matters which are irrelevant".[5]

The judge concluded that Dwyer's refusal to recognise a force majeure event failed to take into account a critical factor preventing Fredbar from supplying its services (namely Mr Bartlett's need to self-isolate), and this was a repudiatory breach of a fundamental term which went to the root of the commercial purpose of the agreement.[6] On the facts, however, Dwyer eventually offered to allow Fredbar to suspend works (albeit on terms which were different from those of the agreement), and the agreement was affirmed when Fredbar accepted that offer.

This case is a helpful illustration for parties on both ends of a force majeure clause under a construction contract. For employers, force majeure notices and claims should be considered honestly, in good faith and genuinely, and the court is likely to take a dim view of any cynical attempt to reject a force majeure event in order to avoid compensating a contractor and effectively require a contractor to carry on against public health guidance. For contractors, it is important to clearly set out the grounds on which force majeure is being claimed, and to be careful not to affirm an agreement (for example, by carrying on working or accepting an offer) if the intention is to treat the contract as at an end due to the employer's repudiatory failure to recognise a force majeure event. Difficulties will no doubt arise in borderline cases where works have been hindered but not prevented, and a judgment call will have to be made as to whether the case is strong enough to simply accept a perceived repudiation and withdraw from the site, bearing in mind the considerable risks if the court later disagrees.

Central to assessing the merits of a force majeure claim is the issue of causation. While this ultimately depends on the wording of the particular force majeure clause in question, it is fair to say that it would take an exceptional case for the court to conclude that force majeure can be invoked without sufficient causation between the

[3] [2021] EWHC 1218 (Ch).

[4] [2015] UKSC 17; [2015] 2 Lloyd's Rep 240.
[5] *Dwyer*, at para 263.
[6] Ibid, at paras 269 and 272.

alleged event and the alleged prevention or disruption of the performance of the contract. This requirement of causation delimits the scope of a force majeure clause, and this can be seen in *Rudolph v United Airlines Holdings Inc*,[7] which was a decision of the US District Court for the Northern District of Illinois concerning a motion to dismiss (and effectively strike out) claims for refunds due to flight cancellations.

> A contractor will have to think long and hard before arguing force majeure based on mere economic hardship. It is tolerably clear that the courts are unlikely to accept that performance should be excused simply because it is financially unprofitable to do so during the pandemic

In that case, District Judge Durkin had to consider the respective scope of force majeure (which did not give rise to an entitlement to a refund) and schedule changes/irregular operations (which gave rise to an entitlement to a refund), and he observed that "... there must be some point where a Force Majeure Event ends, and a Schedule Change or Irregular Operation begins. And to the extent that boundary is unclear, the [Conditions of Carriage], drafted entirely by United, must be construed in Plaintiffs' favour". He then went on to draw a distinction between cancellations of international flights which were directly and proximately caused by travel restrictions, and other cancellations which could have been due to economic self-interest. The former fell comfortably within the scope of force majeure, whereas the latter required further disclosure and evidence.

Although this was an aviation case, there are important parallels which can be drawn with invocations of force majeure in the construction context. A contractor will have to think long and hard before arguing force majeure based on mere economic hardship. It is tolerably clear that the courts are unlikely to accept that performance should be excused simply because it is financially unprofitable to do so during the pandemic. Some degree of prevention directly caused by government-imposed restrictions is likely to be necessary in order to successfully argue force majeure.

[7] 519 F Supp 3d 438 (ND Ill 2021).

Contractual allocation of risks and losses

An inevitable consequence of the Covid-19 pandemic is that parties will suffer financial losses which may not have been envisaged at the time of contract. This naturally creates the temptation to read a contract in a way which gives rise to certain entitlements to compensation for the disruptive effects of the pandemic, and the TCC was faced with such a situation in *Westminster City Council v Sports and Leisure Management Ltd*.[8]

Sports and Leisure Management Ltd (SLM) entered into an agreement with the council to manage certain leisure facilities, and in exchange for the revenue earned from these facilities, SLM had to pay a management fee to the council calculated based on income and a number of other factors. Clause 39 of the agreement provided for amendments to the contract due to any changes in the law, and this allowed (among other things) the management fee to be reduced to zero. SLM contended that the clause went further and provided for the council to pay a "reverse management fee" in the circumstances, relying on other similar forms of contract in the industry.

In rejecting SLM's position, Kerr J observed that the Sport England standard terms are not of much assistance because "... they prompt but do not answer the question how these parties decided to strike the balance when allocating risk to each party in this particular case".[9] The judge was alive to the fact that the contract was competitively tendered and carefully negotiated, and he was not prepared to read extra words into the agreement to allow a reverse payment by the council to SLM where the provision was unilateral:

> "In my judgment, SLM's contention that the Management Fee can drop below zero and become payable by the council to SLM must be rejected. The definition of the Management Fee as a payment to and not by the Authority is absolutely clear. I also accept Mr Goudie's submission that clause 26.1 requires SLM to pay, not receive, the Management Fee; and addresses the mechanism for payment, making provision only for payment one way, not either way."[10]

It is abundantly clear that the court's approach to contractual interpretation is still very much based on the express language adopted by the parties, despite the exceptional commercial implications it might have on the

[8] [2021] EWHC 98 (TCC).
[9] Ibid, at para 41.
[10] Ibid, at para 61.

parties in light of the Covid-19 pandemic. The court is not prepared to step in and save a party from a bad bargain, and consistent with the judicial approach in recent years,[11] Kerr J emphasised that canons of construction such as the contra proferentem principle are a last resort and it was unnecessary for him to decide that point because the issues can be satisfactorily resolved by applying the correct approach to contractual interpretation.[12]

Overall, while each case will depend on its own facts and contractual terms, parties should not assume that liberal interpretations of a contract (be it force majeure clauses or otherwise) will be the panacea for all the contractual problems thrown up by the Covid-19 pandemic. It is clear that the court will remain faithful to the contractual bargain struck by the parties in order to uphold certainty, and even in these exceptional times, any proposed departure from the express wording of a contract will be best pursued in commercial negotiations and settlements rather than in a court of law.

INTERIM AND FINAL PAYMENT MECHANISMS

Given that cash flow is "the very lifeblood of the enterprise" in the construction industry,[13] it is unsurprising that parties keep coming to the TCC year on year with various payment disputes under the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) which raise interesting points of statutory and contractual interpretation. The competing arguments advanced before the TCC represent a constant tug-of-war between employers and contractors in construction projects, and there is often a delicate balance to be struck between the parties' legal rights and obligations.

One of the perennial issues faced by parties and legal practitioners (particularly in the context of so-called "smash and grab" adjudications) is the validity of an employer's payment/pay less notice. This issue took an interesting spin in *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd*,[14] where the contractor argued that the payment notice was invalid because it did not set out the sum which the employer genuinely considered to be due.

In this case, the payment notice in question set out a gross valuation which was only £1 more than the previously certified sum, with a view to later issuing a further payment notice with a different and larger figure. This approach had been taken in a number of previous payment cycles. Noting the previous cases which considered whether a notice provided an adequate agenda for an adjudication,[15] HHJ Eyre QC pointed out that the previous cases did not purport to create a separate legal test, and the question is ultimately whether a notice sets out the sum which an employer genuinely considers due together with the basis on which that sum is calculated.[16]

On the facts, HHJ Eyre QC concluded that the payment notice failed to set out what it genuinely considered to be due, as "[t]he Employer clearly envisaged that the further notice would set out a different figure which would be the figure which the Employer in fact considered to be due".[17] Further, no adequate basis of calculation was shown,

11 See eg *Persimmon Homes Ltd v Ove Arup & Partners Ltd and Another* [2017] EWCA Civ 373; [2017] BLR 417, *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372; [2016] BLR 360 and *Nobahar-Cookson and Others v The Hut Group Ltd* [2016] EWCA Civ 128.

12 *Westminster City Council*, at para 74.

13 See *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* (1973) 71 LGR 162, at para 167 (Lord Denning MR).

14 [2021] EWHC 2441 (TCC); [2022] BLR 72.

15 See *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC); [2015] BLR 704, at para 32 (Akenhead J) and *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EWHC 17 (TCC); [2017] BLR 189, at para 61 (Deputy High Court Judge Alexander Nissen QC).

16 *Downs Road*, at para 45.

17 Ibid, at para 47.

and the mere fact that the net sum could be calculated arithmetically from the gross valuation, the retention, and the amounts previously certified was insufficient in the absence of any breakdown for the gross valuation.[18]

In reaching this conclusion, the judge took into account the employer's previous conduct and gave the following instructive guidance:

> "... It is not necessary to find that the Employer was acting in bad faith in some way in order to conclude that this was not an appropriate course to adopt. The Payment Notices were followed by subsequent notices setting out the very much greater sums which the Employer actually believed were due and the Employer made it clear that it was not seeking to prejudice the Contractor's rights as to the payment date. Nonetheless it is clear that where this practice was adopted the Payment Notices (and Payment Notice 34 in particular) did not set out the amount which the Employer actually considered to be due."[19]

> The notices required by the HGCRA are not just formalities, but substantial requirements to incentivise parties to undertake genuine valuation exercises and then put their cards on the table

This is therefore a cautionary tale for employers which habitually issue payment/pay less notices certifying net payments of £nil or some other minimal sums, without adequately setting out the basis of calculation within the notices or any accompanying materials. This kind of conduct is particularly risky where the notices are clearly intended as no more than placeholders for subsequent revised valuations, even though the conduct cannot necessarily be characterised as bad faith. After all, the notices required by the HGCRA are not just formalities, but substantial requirements to incentivise parties to undertake genuine valuation exercises and then put their cards on the table.

Interesting questions will arise in borderline cases where the employer sets out a basis of calculation of some sort, but the net valuations are repeatedly calculated as minimal sums and the basis of the deductions or valuations are not clearly explained. There is of course an important distinction between an invalid notice which does not set out an employer's genuine assessment on the one hand, and a lack of substantiation of the purported valuations on the other.[20] Where an employer repeatedly certifies minimal payments by deducting increasing sums and/or reducing previous valuations without justification (despite works progressing on site), there is at least an argument to be made that an employer is not really setting out what it genuinely considers to be due. Ultimately, it will be a question of fact and degree in each case.

Apart from issuing notices which undervalue a contractor's account, another common tactic adopted by employers is the withholding of certain certificates in an attempt to prevent the due date and/or final date for payment from crystallising. This was the scenario considered in *CC Construction Ltd v Mincione*,[21] again by HHJ Eyre QC, where the parties disputed (among other things) the correct due date for the final payment under a JCT Design and Build Contract 2011. The employer, Mr Mincione, contended that a notice of completion of making good must inevitably be issued in every project, without which the final payment could not fall due.

HHJ Eyre QC rejected Mr Mincione's arguments and concluded that where there is no scope or possibility for the issuance of a notice of completion of making good, then no account is to be taken of the theoretical date for such a notice in calculating the due date. That will be the position in a case where the employer has not issued a schedule of defects and/or an instruction requiring the rectification of those defects (or where the time for doing so has passed ie within 14 days of the expiry of the rectification period).[22] On the facts, the purported notice of completion of making good was not preceded by a schedule of defects or instruction within the contractual timeframe, such that it was not a relevant notice for the purpose of calculating the due date for the final payment.[23]

The decision in *CC Construction* is a continuation of the trend which began with *Dr Jones Yeovil Ltd v The Stepping Stone Group Ltd*, where HHJ Russen QC observed that "... the court should not be too hidebound by the existence

18 Ibid, at para 48.
19 Ibid, at para 49.
20 See, by way of analogy, *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC); (2017) 34 BLM 3 3, at para 36 (O'Farrell J).
21 [2021] EWHC 2502 (TCC); [2022] BLR 48.
22 Ibid, at paras 66 to 67.
23 Ibid, at para 89.

or absence of notices which [are] required as part of the contractual machinery regulating the cash flow between the parties when it comes to the determination of their substantive rights".[24] However, rather than simply treating a making good notice as having been issued when that ought to have been done (which involves a legal fiction), HHJ Eyre QC adopted the neater solution of disapplying the relevant provisions in circumstances where no defects are required to be made good at the end of the rectification period.

> The decision in *CC Construction* provides welcome clarification on the operation of the standard final payment and conclusivity provisions under the JCT forms of contract, and it is important reading for any parties which are in dispute as to the effect of a final statement and the relevant due date

It is noteworthy that HHJ Eyre QC also considered the effect of clauses 1.8.2 and 4.12.6 of the JCT Design and Build Contract 2011. The former required a notice of dispute prior to the due date to stop the final statement from becoming conclusive as to the sum due, and the latter provided that the final statement would be conclusive evidence on extensions of time and loss and expense unless either party commenced adjudication, arbitration or litigation before the due date. The judge rejected the argument that a notice of dispute and the commencement of proceedings were both necessary in order to prevent a final statement from becoming conclusive:

> "It follows that the words 'and subject to clause 1.8.2' in clause 4.12.6 … do not provide for two steps each of which must be taken in order to prevent the Final Statement becoming conclusive. Instead, they provide alternative routes to the same result and make it clear that if proceedings have been started before the due date then the Final Statement does not become conclusive even if no notice of dispute has been given."

The decision in *CC Construction* provides welcome clarification on the operation of the standard final payment and conclusivity provisions under the JCT forms of contract, and it is important reading for any parties which are in dispute as to the effect of a final statement and the relevant due date. Above all, it is encouraging to see that the TCC is astute to prevent a party from indefinitely avoiding the final payment and/or the release of retention by withholding a making good certificate where there are in fact no outstanding defects to be rectified by a contractor.

[24] [2020] EWHC 2308 (TCC), at para 89.

DEVELOPMENTS IN ADJUDICATION

Disputes arising from a single construction contract

A threshold jurisdictional question for any adjudication is the existence of a dispute arising under a single construction contract. The default position under s108 of the HGCRA is that the right of adjudication presupposes a dispute arising from a single construction contract. Paragraph 8 of Part I of the Scheme for Construction Contracts specifically provides that an adjudicator could only adjudicate on multiple disputes under the same contract or related disputes under multiple contracts at the same time if all the parties to those disputes give their consent.

The TCC is often faced with contractual arrangements which are cumbersome and involve multiple agreements or purchase orders relating to the same project, such that a referral of the disputes to the same adjudication may well fall foul of s108 of the HGCRA. A recent example of this can be found in *Delta Fabrication & Glazing Ltd v Watkin Jones & Son Ltd*,[25] where Watkin sub-contracted the brick slip cladding works to Delta under a subcontract order in August 2019, and then further sub-contracted the roofing works to Delta under another subcontract order in September 2019.

Delta contended that there was an agreed variation by conduct to amalgamate the contracts or some other form of amalgamation in effect for the purposes of the HGCRA. HHJ Watson analysed the facts and roundly rejected Delta's contentions. Reliance was placed on a payment notice from Watkin (as a purported offer to amalgamate) and a subsequent payment application by Delta (as a purported acceptance), but the judge found that "... although the payment notice was for one figure for both contracts, the supporting documentation did not confuse or amalgamate the contracts but dealt with the calculations separately", and Delta's own payment application "... also breaks down the payment application by reference to the cladding works and the roof works, with separate figures for the value of the separate works packages that were awarded under the contracts".[26]

In reaching this conclusion, HHJ Watson took into account the various correspondence which made reference to the separate subcontracts (including the separate deeds of warranty in favour of the employer),[27] and noted that "... it is surprising that there is not a single document expressly referring to the fact that the contracts had been amalgamated or giving the new contract a new purchase order number or reference number".[28] For essentially the same reasons, the judge found that there was no representation giving rise to an estoppel, and no evidence of reliance or detriment in any event.[29]

It is clear that the court will not lightly imply or infer an amalgamation of separate contracts in the absence of any written agreement to that effect, and that very consistent and unequivocal conduct would be necessary to even begin discharging the evidential burden of proving an amalgamation. Although Delta argued alternatively that there could be separate contracts at common law but a single contract for the purpose of s108 of the HGCRA, HHJ Watson had no difficulty rejecting this argument as well, given that there was no authority to support the argument that the words "contract" and "agreement" bore different meanings under the HGCRA.[30] Accordingly, parties wishing to adjudicate on multiple written agreements or purchase orders should either do so separately/sequentially or seek the other party's consent to a consolidated adjudication.

> It is clear that the court will not lightly imply or infer an amalgamation of separate contracts in the absence of any written agreement to that effect, and that very consistent and unequivocal conduct would be necessary to even begin discharging the evidential burden of proving an amalgamation

A different issue which arises from time to time is whether a contract qualifies as a "construction contract" within the meaning of s108 of the HGCRA. This is not necessarily a straightforward issue where the subject matter of the adjudication is not a building contract per se, but a related or ancillary agreement such as a collateral warranty, as in the recent case of *Toppan Holdings Ltd and Another v*

25 [2021] EWHC 1034 (TCC); (2021) CILL 4521.
26 Ibid, at paras 13 to 14.
27 Ibid, at paras 16 and 24.
28 Ibid, at para 22.
29 Ibid, at paras 38 to 41.
30 Ibid, at para 33.

Simply Construct (UK) LLP,[31] which concerned a collateral warranty executed in late 2020 by the building contractor (Simply Construct) in favour of the employer (Toppan) and the long-leaseholder (Abbey), four years after practical completion in 2016.

Deputy High Court Judge Martin Bowdery QC kept a tight focus on the terms and context of the collateral warranty in question. Although the TCC had previously found that certain collateral warranties could amount to construction contracts,[32] the judge distinguished from those cases because the warranties in those earlier cases involved a contractor undertaking to carry out and complete the works while they were ongoing. In contrast, the collateral warranty provided to Toppan/Abbey exclusively related to works which had already been completed four years ago (and any latent defects discovered post-completion had also been remedied months before executing the warranty).[33] In effect, the warranty was akin to a manufacturer's product warranty, such that it was not a construction contract and there was no right to adjudicate.[34]

This case is an instructive example which demonstrates that the court is concerned with substance rather than form when deciding whether an instrument amounts to a construction contract for the purposes of the HGCRA. From a practical perspective, if purchasers/leaseholders wish to avail themselves of adjudication rights against a building contractor, then they should ensure that the collateral warranties are executed as early as possible while the works are still ongoing. In those circumstances, a later assignment of the benefit of such collateral warranties to a subsequent purchase ought not to affect the original status of the warranties as construction contracts under s108 of the HGCRA.

Serial adjudications

An inevitable consequence of the statutory right under s108 of the HGCRA to refer any dispute/difference for adjudication at any time is that there can often be more than one adjudication in relation to any given project, with the corresponding risk of overlaps/inconsistencies between different adjudication decisions. The undesirability (and impermissibility) of serial adjudications on the same or substantially the same dispute was expressly highlighted by Coulson J (as he then was) in *Benfield Construction Ltd v Trudson (Hatton) Ltd*:

> "... Allowing one party to raise one legal issue at a time, in serial adjudications extending over many months or even years, until that party achieved a result that it liked, would place an intolerable burden on the other party. It was not the purpose for which adjudication was designed. ... Adjudication is supposed to be a quick one-off event; it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or a new way of putting a case occurs to one or other of the contracting parties. ..."[35]

Therefore, when a responding party contends during an enforcement hearing that the dispute referred to adjudication overlaps with a prior adjudication decision, the TCC is anxious to carefully consider whether there has indeed been an improper attempt to re-adjudicate the same or substantially the same dispute, which is a question of fact and degree in each case. Two interesting cases in 2021 raised this issue.

First, in *Lewisham Homes Ltd v Breyer Group plc*,[36] the adjudication decision being enforced concerned an award of damages for the supply and installation of defective entrance door sets for certain flats. Breyer argued that this was the same or substantially the same dispute as the matters decided in a prior adjudication, where the same adjudicator found that the doors were defective but refused to award any interim/on-account payment for remedial works.

Waksman J started by helpfully re-stating the well-established principles[37] based on previous Court of Appeal and TCC authorities[38] – in particular, he emphasised that "... the mere fact of some differences between the way the case is put on each side is not necessarily sufficient. It is especially so if in truth the second adjudication is no more than an attempt at an improved version of the first. Of relevant [sic] here, but not determinative, will be whether the point now taken could have been taken before. It seems to me overall that the exercise of comparison in addition should be conducted in a realistic and common-sense fashion".[39]

31 [2021] EWHC 2110 (TCC); [2021] BLR 705.
32 See eg *Parkwood v Laing O'Rourke Wales and West Ltd* [2013] EWHC 2665 (TCC); [2013] BLR 589 and *Swansea Stadium Management Ltd v City and County of Swansea and Another* [2018] EWHC 2192 (TCC); [2018] BLR 652.
33 *Toppan Holdings*, at paras 21 to 25.
34 Ibid, at paras 30 to 31.
35 [2008] EWHC 2333 (TCC); (2008) CIL 2633, at paras 55 and 57.
36 [2021] EWHC 290 (TCC).
37 Ibid, at paras 33 to 34.
38 See eg *Benfield Construction, Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1737; [2007] BLR 67 and *Matthew Harding (t/a MJ Harding Contractors) v Paice and Another* [2016] EWCA Civ 1231; [2016] BLR 85.
39 *Lewisham Homes*, at para 34(7).

Turning to the facts, Waksman J considered that the dispute referred to the first adjudication was about liability for breach of contract in respect of the doors and the recovery of a payment on account, whereas the second adjudication concerned a claim for a final award of damages for those defects.[40] Furthermore, whereas the first decision found that Breyer was liable and did not award any payment on account, the second decision addressed the adequacy of the proposed remedial works and the quantum of damages which had not been decided previously.[41] The judge was not at all persuaded that the prior adjudication decision in any way precluded Lewisham from seeking damages insofar as Breyer was offering reasonable replacements.[42]

The result in *Lewisham Homes* is plainly correct, and there are clear parallels with the 2019 decision of *Hitachi Zosen Inova AG v John Sisk & Son Ltd*,[43] where Stuart-Smith J decided that an adjudication decision on the quantum of a variation did not trespass on a prior adjudication decision because the earlier decision expressly refrained from deciding on quantum due to the lack of evidence at that stage. An analogy can also be drawn with the 2020 decision of *Global Switch Estates 1 Ltd v Sudlows Ltd*,[44] where O'Farrell J concluded that a rejection of a loss and expense claim in an adjudication did not overlap with a prior adjudication decision on extensions of time, given that the earlier adjudication did not consider the issue of loss and expense. As the court has repeatedly pointed out, the emphasis is very much on the terms of the two adjudication decisions in question, and not just on the scope of the disputes referred.

The second case to note in 2021 was *Prater Ltd v John Sisk and Son (Holdings) Ltd*,[45] where the issue of serial adjudications arose in a somewhat unusual context. Rather than contending that an adjudication decision impermissibly reopened a previously decided matter, Sisk sought to argue (among other things) that the adjudicator's decision (Adjudication 4) in question should not be enforced because he relied on his findings in a prior adjudication decision (Adjudication 2) which went beyond his jurisdiction. Sisk had previously issued a notice of dissatisfaction in respect of the Adjudication 2 decision, but no steps had been taken to reopen or set aside that decision in court.

Deputy High Court Judge Veronique Buehrlen QC described this argument as "novel" because there was "no direct authority on the point".[46] Upon considering the contractual provisions (clause W2 of the NEC3 form of contract), the judge rejected Sisk's argument on the basis that the parties remained bound by the adjudication decision unless and until it has been challenged in court:

> "... it does not follow that the decision falls to be treated as a nullity in subsequent adjudications when it has yet to be challenged by the aggrieved party. Clause W2.3(11) expressly states that the Adjudicator's decision is binding on the Parties unless and until revised by the tribunal. Further, I do not think that anything turns on whether one describes the effect of a lack of jurisdiction on an adjudication decision as resulting in a non-binding decision, an unenforceable decision or a decision that is a nullity. Unless and until the decision is challenged before a court or tribunal (as appropriate) it is to be treated as binding."

The judge in any event rejected the proposition that the nullity of the Adjudication 2 decision would necessarily affect the enforceability of the Adjudication 4 decision – insofar as the adjudicator failed to appreciate the impact on Adjudication 4 of the jurisdictional issue in Adjudication 2, that would simply be an error of law made by the adjudicator within his jurisdiction in Adjudication 4.[47] Such an error simply would not go to the enforceability of the decision in Adjudication 4.

Some aspects of this decision may raise questions of practicality – for instance, it is unclear why a losing party would ever initiate proceedings on a jurisdictional issue when the winning party has not commenced an enforcement action, although Sisk could have commenced pre-emptive Part 8 proceedings in respect of Adjudication 2 in anticipation of the enforcement of the Adjudication 4 decision. On any view, this is probably academic in light of the judge's (correct) conclusion that, at best, the adjudicator made an error of law which did not in any way go to his jurisdiction.

It is obvious that the TCC does not wish to give any encouragement to disgruntled losing parties to avoid enforcement by disguising arguments on the underlying merits as jurisdictional objections. Whilst genuine overlaps between different adjudication decisions can and do arise, the TCC is only likely to intervene if there

40 Ibid, at paras 35 to 37.
41 Ibid, at para 40.
42 Ibid, at paras 41 to 48.
43 [2019] EWHC 495 (TCC); (2019) CILL 4302, at paras 35 to 45.
44 [2020] EWHC 3314 (TCC); (2020) 38 BLM 01 5, at para 50 (viii).
45 [2021] EWHC 1113 (TCC); [2021] BLR 474.
46 Ibid, at para 17.
47 Ibid, at paras 25 and 26.

is a clear contradiction in the findings of two different adjudication decisions on the same or substantially the same issue, and there are clear indications that a party is seeking to have a second bite at the cherry in order to reverse/improve on a previous adjudication.

Exhaustion of jurisdiction

A breach of natural justice arising from an adjudicator's failure to exhaust his/her jurisdiction in respect of the dispute referred and the defences raised has been a well-established ground for resisting enforcement, ever since the decision of *Pilon Ltd v Breyer Group plc.*[48] Over the years, this ground has been successfully invoked in the Scottish courts,[49] but has not been given as much attention in the TCC as compared to other grounds.

This changed in 2020, with *Global Switch,*[50] where O'Farrell J helpfully analysed and summarised the applicable legal principles,[51] and then held that there was indeed a breach of natural justice in that case because the adjudicator failed to take into account the contractor's loss and expense claim when determining the employer's claim for payment of the net sum considered to be due (which was in addition to the claim for declaratory relief).[52]

Against that background, the TCC has had further occasions in 2021 to consider other failures to exhaust an adjudicator's jurisdiction. In *Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd* (which has already been considered above in the context of payment disputes), the employer relied on a deduction for the contractor's alleged breach in respect of the capping beam installation, in order to reduce the sum due under the interim payment in question. The adjudicator refused to consider this issue on the basis that it went beyond his jurisdiction.

HHJ Eyre QC held that in deciding the sum due in the payment cycle in question, the adjudicator should have at least considered the defences put forward by the employer to reduce the sum claimed, even if the alleged deduction could not in fact be made upon analysing the relevant contractual provisions (as contended by the contractor):

> "If the adjudicator had considered the capping beam claim and had concluded that the defence did not operate to reduce the amount due his decision would have been unimpeachable. ... The distinction between an adjudicator addressing a defence and concluding that it fails and an adjudicator deliberately declining to address a defence can be a narrow one but it is a real one. I am satisfied that by deliberately deciding not to address this defence the adjudicator was declining to address a defence which the Employer was entitled to advance and entitled to have considered by the adjudicator."[53]

A similar issue arose in *CC Construction Ltd v Mincione*,[54] which has been considered above from the perspective of contractual payment mechanisms. In that case, as in *Downs Road*, the contractor sought declarations as to the

48 [2010] EWHC 837 (TCC); [2010] BLR 452.
49 See eg *NKT Cables AS v SP Power Systems Ltd* [2017] CSOH 38; (2017) 34 BLM 04 9.
50 [2020] EWHC 3314 (TCC).
51 Ibid, at para 50.
52 Ibid, at para 56.
53 [2021] EWHC 2441 (TCC); [2022] BLR 72, at para 61.
54 [2021] EWHC 2502 (TCC) ; [2022] BLR 48.

valuations as well as an order for payment of the net sum due. The adjudicator refused to deal with the employer's defence/set-off based on liquidated damages[55] on the following basis:

> "It is established law that an Adjudicator cannot open up a certificate considered to be conclusive, as such, once the due date has been determined, the Adjudicator will have no further power to open up the Final Statement. In respect of liquidated damages, I conclude that it is not a part of the dispute I have been asked to decide and therefore cannot be raised in set-off in these circumstances."[56]

HHJ Eyre QC concluded that there was plainly a material breach of circumstances, as "... the adjudicator set out his conclusion that he had declined to consider the liquidated damages claim as a potential set-off. The adjudicator said in terms that he was declining to consider the potential set-off because he did not regard it as part of the dispute before him".[57]

As a general rule of thumb, where an adjudicator opines that an issue falls outside his/her jurisdiction, it would be prudent to at least expressly state (in the alternative) some brief substantive reasoning on why that defence would have failed in any event

Given the wording of the adjudicator's decision (as cited above), it is perhaps unexceptionable that the adjudicator clearly failed to exhaust his jurisdiction in respect of the employer's defence/set-off based on liquidated damages. However, one cannot help but imagine whether the result ultimately came down to infelicitous wording in the decision – had the adjudicator simply stated that the liquidated damages defence could not succeed because the final certificate could not be opened up as a matter of law (which seems to be part of the adjudicator's reasoning), then the judge would most likely have reached a different conclusion.

As a general rule of thumb, where an adjudicator opines that an issue falls outside his/her jurisdiction, it would be prudent to at least expressly state (in the alternative) some brief substantive reasoning on why that defence would have failed in any event. That way, even if the responding party successfully argues a breach of natural justice, it would probably struggle to establish that such a breach was material (given that the defence would have been rejected on the merits in any event).

One further case on the failure to exhaust an adjudicator's jurisdiction is worth mentioning, and it hails from the Outer House of the Scottish Court of Session. In *Barhale Ltd v SP Transmission plc*,[58] Lord Tyre held that an adjudicator completely failed to address the responding party's argument based on the proper contractual basis for assessment and payment for excavation and associated disposal and filling works (which relied on the Civil Engineering Standard Method of Measurement).[59]

Of particular interest is Lord Tyre's discussion on the proper test for finding that there has been a failure to exhaust an adjudicator's jurisdiction. Readers may recall that in *RGB P&C Ltd v Victory House General Partner Ltd* (which was considered in the 2019 annual review), Jefford J observed that an inadvertent failure to consider one of a number of issues would not ordinarily render a decision in breach of natural justice.[60] Relying on Stuart Smith J's dicta in *KNN Coburn LLP v GD City Holdings Ltd*,[61] Lord Tyre concluded that the touchstone should be whether the adjudicator has effectively addressed the major issues raised on either side, without having to characterise the issue as a breach of natural justice (whether deliberate or inadvertent):

> "For my part, and with respect to Jefford J, I find this analysis somewhat difficult to reconcile with the clear distinction drawn in *Bouygues* (by Chadwick LJ, at para 27) and in *AMEC v TWUL* (by Coulson J at para 88) between not answering the right question at all and answering the right question but in the wrong way. Whilst I respectfully share Jefford J's difficulty in envisaging situations in which an inadvertent failure to consider an issue could constitute a breach of natural justice, it does not appear to me to be necessary to characterise every failure by an adjudicator to answer a question that he was bound to address as a breach of natural justice."[62]

55 *CC Construction*, at paras 127 to 129.
56 Ibid, at para 47.
57 Ibid, at para 131.
58 [2021] CSOH 2.
59 Ibid, at para 32.
60 [2019] EWHC 1188 (TCC); [2019] BLR 465, at para 53.
61 [2013] EWHC 2879 (TCC), at para 49.
62 *Barhale*, at para 29.

While this Scottish decision is only of persuasive value in the English courts, there is much to be said for Lord Tyre's suggestion that a failure to consider a material issue in the parties' dispute should be a sui generis jurisdictional ground for resisting enforcement, without having to consider the issue through the lens of natural justice.

Indeed, the requirement of a deliberate breach of natural justice would be academic in most cases where there has been a refusal to deal with a particular issue, and it is worth noting that O'Farrell J's summary of the legal principles in *Global Switch* did not place any emphasis on the need for a failure to consider an issue to be deliberate.[63] It would be interesting to see whether the TCC would adopt Lord Tyre's reasoning in a future case where the distinction between a deliberate and an inadvertent failure is material on the facts.

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Reservation of rights and waiver

In the heat of an adjudication, it is very easy to become too engrossed in the substance and forget to make an appropriate reservation of rights in case there are any potential jurisdictional grounds for resisting enforcement, the result of which would be a waiver of any such objections. The relevant principles governing an effective reservation of rights were set out by Coulson LJ in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*,[64] which was discussed in the 2019 annual review – ultimately, much will depend on the wording of the reservation, and if it is a general reservation, then whether the objector knew or should have known of specific grounds for a jurisdictional objection.

A good illustration of those principles in action can be found in the decision of the Inner House in *Hochtief Solutions AG and Others v Maspero Elevatori SpA*,[65] which concerned a post-termination adjudication arising from certain lift installations in the towers of the Queensferry Crossing. Maspero contended that the adjudicator exceeded his jurisdiction by wrongly taking into account an agreement reached between the parties in Como, Italy, and concluding that this agreement was a variation to the original subcontract.

The purported jurisdictional challenge was rejected by the Outer House, and the Inner House upheld the lower court's decision. Lord Woolman had no difficulty finding that Maspero failed to make its challenge appropriately and clearly during the adjudication, because "[i]n the response and the rejoinder it did not (i) expressly use the term "jurisdiction", or (ii) ask the adjudicator to resign … It continued to participate in the adjudication and relied on the Como agreement in seeking redress".[66] In any event, it was made far too late halfway through the adjudication procedure.[67] Responding parties should therefore bear in mind that the wording and timing of a purported reservation are both critical.

Back in the TCC, the recent case of *Croda Europe Ltd v Optimus Services Ltd*[68] further highlights the fact that a reservation of rights is important not just at the start of an adjudication, but also after the adjudicator's decision has been issued. In this case, Optimus paid the adjudicator's fees and also sought corrections to the decision based on the slip rule without any reservation of its position at all, which prompted Croda to argue that Optimus had in any event waived its jurisdictional objections.

Deputy High Court Judge Roger ter Haar QC accepted that the mere payment of an adjudicator's fees does not necessarily amount to approbation of the adjudicator's decision.[69] On the facts, however, Optimus' attempt to extend the date for payment by reference to the amount of interest payable was considered to be "the clearest possible recognition that the Decision was binding", such that Optimus had effectively waived any right to raise jurisdictional challenges.[70]

63 *Global Switch*, at para 50(viii).
64 [2019] EWCA Civ 27; [2019] BLR Plus 20, at para 92 (not disturbed on appeal).
65 [2021] CSIH 19.
66 Ibid, at para 37.
67 Ibid, at para 38.
68 [2021] EWHC 332 (TCC).
69 Ibid, at para 48.
70 Ibid, at paras 49 to 51.

It is clear that the courts will not hesitate to hold that a responding party is precluded from raising a jurisdictional challenge for want of an effective objection or reservation of position during the adjudication process. Although the issue of reserving a party's position often comes as an afterthought, these recent cases are a salutary reminder of the importance to think long and hard about jurisdictional issues and consider the appropriate protective steps to take as soon as the notice of adjudication lands.

Enforcement in the context of insolvency

The 2020 annual review discussed a series of important decisions regarding the enforceability of adjudication decisions in favour of an insolvent party, starting with the long-awaited Supreme Court decision in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd.*[71] In essence, the Supreme Court confirmed that an insolvent party has a statutory and contractual right to refer a dispute for adjudication, despite the existence of cross-claims which will eventually have to be accounted for in the context of insolvency set-off under the Insolvency Rules.[72]

In *Bresco*, Lord Briggs emphasised that adjudication would not be futile simply because an adjudicator's decision may not be enforceable in the end,[73] and he observed obiter that enforcement by summary judgment may in fact be appropriate in some cases:

> "... There may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour. Or the disputed cross-claim may be found to be of no substance. *Or, if the cross-claim can be determined by the adjudicator, because the claim and cross-claim form part of the same "dispute" under the contract, the adjudicator may be able to determine the net balance. If that is in favour of the company, there is again no reason arising merely from the existence of cross-claims why it should not be summarily enforced.*"[74] (Emphasis added.)

In light of Lord Briggs' dicta in *Bresco*, there have been various cases[75] where adjudication decisions were enforced in favour of an insolvent party (with adequate security provided in line with *Meadowside Building Developments Ltd (in liquidation) v 12–18 Hill Street Management Co Ltd).*[76] The assumption in these cases was that enforcement would be permissible in circumstances if an adjudicator's decision or a series of decisions addressed the totality of the mutual dealings and cross-claims between the parties, such that a net balance could effectively be taken on the basis of the adjudication decision(s).

Those assumptions became the subject of intense scrutiny in the recent Court of Appeal decision in *John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd*,[77] which is certainly the most significant decision on this topic since *Bresco* as it seeks to flesh out the practical scope and implications of the Supreme Court's earlier guidance. Readers will recall that last year's annual review covered Fraser J's judgment in this same matter.

For those who are acting for an insolvent party which intends to commence or has already embarked on an adjudication, it is worth reading the Court of Appeal's latest decision in full. The bulk of the decision dealt with adequacy of the security offered by John Doyle and its funder, Henderson & Jones, who sought to argue that Fraser J failed to take into account a number of other alternatives purportedly offered during the hearing in the TCC.

Coulson LJ was not at all impressed by the lack of clarity over the precise forms of security being offered both in the TCC and in the Court of Appeal. After summarising the purpose and framework of the adjudication enforcement procedure,[78] Coulson LJ noted that "... a claimant company in liquidation, seeking summarily to enforce an adjudicator's decision, should take all necessary steps to ensure that the hearing itself is as efficient as possible, and that it is clear to everyone what issues the judge is being asked to decide".[79] This is a heavy burden, as demonstrated by the nature of the evidence which is said to be expected from a claimant:

> "In particular, any undertakings or security being offered by a claimant company in liquidation need to be clear, evidenced and unequivocal. It is not for

71 [2020] UKSC 25; [2020] BLR 497.
72 Ibid, at paras 46 to 53.
73 Ibid, at paras 59 to 64.
74 Ibid, at para 65.
75 See eg *Balfour Beatty Civil Engineering Ltd and Another v Astec Projects Ltd* [2020] EWHC 796 (TCC); (2020) 37 BLM 06 8 and *Styles Wood Ltd v GE CIF Trustees* [2020] EWHC 2694 (TCC).
76 [2019] EWHC 2651 (TCC); [2020] BLR 65.
77 [2021] EWCA Civ 1452; [2021] BLR 717.
78 Ibid, at paras 28 to 30.
79 Ibid, at para 31.

> the judge to point out during the hearing potential inadequacies with the security offered, in order to give the claimant an opportunity to amend its offer on the hoof in the hope of making it more acceptable. Neither is it for the judge to endeavour to turn vague suggestions by counsel, in the cut and thrust of oral argument, into a potentially binding agreement between the parties, or to try and tease out of the material before the court whether some other offer could or might have been made instead and, if so, what its hypothetical consequences might be. Such an approach gives rise to confusion and potential injustice. ..."[80]

Coulson LJ then went on to criticise John Doyle's approach, including the excessive volume of evidence and the "... unhelpfully aggressive approach to enforcement ..." in correspondence which consisted of piecemeal concessions over time in respect of the forms of security offered.[81] Against this background, Coulson LJ found on the facts that (among other things) there was no clear or unequivocal evidence of the alternative forms of security being relied on:

> (i) The evidence contained no clear and unequivocal offer to pay the judgment sum into an escrow account or into court, despite a few fleeting mentions in written and oral submissions).[82] On any view, an order requiring a payment into court was "... the worst of all possible worlds" because "... it would deprive Erith – a working contractor – of cash, whilst leaving the money sitting uselessly in the court's account".[83]
>
> (ii) The evidence did not contain any statement by any insurer that (in lieu of an adequate "after-the-event" insurance policy) they would offer Erith some form of deed of indemnity as security for any orders for Erith's costs that may be made in proceedings against John Doyle, and it was wholly unclear what legal/evidential value the email exchanges relied on by John Doyle would actually have.[84]

For the purposes of future adjudications/enforcement actions, the most significant part of the decision is no doubt Coulson LJ's obiter discussion on the circumstances in which an insolvent company would be able to enforce an adjudicator's decision. In particular, Coulson LJ took issue with Lord Brigg's obiter suggestion (as cited above) that an adjudicator's decision would be enforceable if it addresses all of the parties' claims/cross-claims:

> "The difficulty is that, on the face of it, Lord Briggs' third example takes no account of the fact that an adjudicator's decision is necessarily provisional, and cannot therefore be regarded as the final determination of the net balance. To put the point another way, the third example used by Lord Briggs at para 65 would appear to run counter to the reasoning and result in *Bouygues*, where summary judgment was refused."[85]

Coulson LJ[86] placed renewed emphasis on the seminal House of Lords decision of *Stein v Blake,*[87] where Lord Hoffmann explained that the original chose in action ceased to exist and was replaced by a claim to a net balance based on the statutory insolvency set-off under the Insolvency Rules – this reasoning was also the basis on which the Court of Appeal in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*[88] refused to enforce an adjudication decision in favour of an insolvent party.

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After critically reviewing Lord Brigg's dicta in *Bresco* against the previous authorities, Coulson LJ opined that the provisional finding of an adjudicator, even on a single final account dispute, cannot be treated as if it were a final determination of the net balance, in circumstances where the other party maintains its set-off and cross-claim. Coulson LJ characterised this as "... a question of the insolvent company's cause of action being for the net balance only" and "... not a matter of discretion because it is impossible to waive or disapply the Insolvency Rules".[89]

80 Ibid, at para 32.
81 Ibid, at paras 33 to 36.
82 Ibid, at paras 37 to 56.
83 Ibid, at para 58.
84 Ibid, at paras 65 to 75.
85 Ibid, at para 90.
86 Ibid, at paras 84 and 85.
87 [1996] AC 243.
88 [2000] EWCA Civ 507; [2000] BLR 522.
89 *John Doyle*, at para 98.

Lewison LJ also gave a separate concurring judgment on this particular issue, emphasising that "... if the liquidator is only entitled to sue for the balance (as held in *Stein v Blake* and *MS Fashions*, and as Lord Briggs himself said at para 29) it is difficult to see how it is possible for a court to give judgment for a larger sum. Put simply, it goes beyond the company's entitlement".[90] He also pointed out that even if a liquidator undertook not to make a distribution of the assets for a particular period, there remains a risk that "... a subsequent distribution may well have the effect of precluding the application of insolvency set-off if there are insufficient undistributed assets remaining in the liquidation".[91]

It is noteworthy that Coulson and Lewison LJJ's discussions above were strictly obiter, as John Doyle failed to satisfy the court that the proposed security was sufficient, and there was in any event a potential cross-claim/set-off under a separate contract which had not been addressed in the adjudication decision in question.[92] Nevertheless, this is clearly intended to provide authoritative guidance for the benefit of parties in future adjudications and enforcement actions, and so its importance should not be underestimated.

There is arguably an uneasy tension between the Supreme Court's decision in *Bresco* and the Court of Appeal's dicta in *John Doyle*. On the one hand, Lord Briggs' ratio in *Bresco* was that the parties' cross-claims have not lost their separate identity for the purposes of assignment under the Insolvency Rules, and that one should not take an over-literal interpretation of Lord Hoffmann's speech in *Stein v Blake*.[93] On the other hand, the Court of Appeal in *John Doyle* has effectively ruled out enforcement in most circumstances, on the basis that the only cause of action surviving under the Insolvency Rules is that of the net balance after an insolvency set-off, and that the court cannot enter judgment for any claims/cross-claims absent a final determination of that net balance.

The conceptual distinction being drawn is a fine one. An insolvent party's claim can continue to exist for the purpose of constituting a dispute which can be referred for adjudication, but that claim does not amount to a standalone cause of action or chose in action which is assignable by the parties or enforceable by the courts by way of summary judgment. The net effect of the *Bresco* and *John Doyle* decisions is that an insolvent party is free to adjudicate on its dealings with another party in whole or in part, but it would only be in very rare cases that the decision would be enforceable where there are cross-claims and set-offs in play.

In reality, the Court of Appeal has now left a *very* narrow window for the enforcement of an adjudication decision in favour of an insolvent party, and the result being achieved is not unlike that of *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* (albeit the reasoning is now based on the permissibility of enforcement rather than an adjudicator's jurisdiction).[94] Almost every construction project gives rise to cross-claims on both sides, and a final account dispute is itself the epitome of a "kitchen sink" mixture of cross-claims and set-offs. Moreover, the existence of cross-claims is all the more likely given the typical complications leading up to the point of insolvency (for example, in terms of non-payment and/or unsatisfactory progress or quality of works), such that it is difficult to imagine a concrete scenario where enforcement would be possible.

The message is therefore clear – an insolvent party which embarks on a final account or other similar adjudication regarding the parties' various cross-claims should not expect to be able to enforce that decision, given that the decision is necessarily provisional. Some will no doubt argue that this takes away the force and utility of adjudication as a temporarily binding resolution short of litigation; others will say that a liquidator is now prevented from preserving the sums awarded by an adjudicator from the risk of future insolvency of the losing party. Be that as it may, these "futility" arguments have already been rejected in both *Bresco*[95] and *John Doyle*,[96] and they are unlikely to gain any traction at an enforcement hearing before the TCC.

Unless and until the Supreme Court adopts a different approach in a future appeal, the dust has settled for now on the issue of enforcement and the incredible hurdles which an insolvent party faces. Any liquidator or third-party funder intending to incur the costs of an adjudication should therefore do so with eyes wide open as to the prospects (or lack thereof) of enforcement in due course.

90 Ibid, at para 145.
91 Ibid, at para 150.
92 Ibid, at para 94.
93 *Bresco*, at para 50.
94 [2009] EWHC 3222 (TCC); [2010] BLR 89.
95 *Bresco*, at paras 58 to 64.
96 *John Doyle*, at paras 95 and 96.

Enforcement under contracts governed by foreign law

Given the international nature of many construction projects in the UK, construction contracts involving foreign parties and/or governed by foreign law are by no means uncommon. While it is clear that an adjudicator would have the requisite jurisdiction to determine a dispute arising from a UK project even though the construction contract is governed by foreign law (see s104(7) of the HGCRA), an interesting conflict of law issue arises in the event of an attempt to enforce the adjudicator's decision in the English courts – would the English courts be the appropriate forum for such enforcement proceedings?

This very question was previously raised in the annual review for 2019, in the context of the decision in *Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd.*[97] Legal practitioners have long sought to find an answer to this question, especially in the post-Brexit legal landscape. Thankfully, the court has now had the opportunity to clarify the position in *Motacus Constructions Ltd v Paolo Castelli SpA*,[98] where a construction contract relating to the fitting out of the One Bishopsgate Plaza Hotel in London was governed by Italian law and contained an exclusive jurisdiction clause in favour of the Parisian courts. Unsurprisingly, the defendant argued that the adjudicator's decision could only be enforced by the Parisian courts.

HHJ Hodge QC undertook a careful analysis of the Civil Jurisdiction and Judgments Act 1982 as amended by the Private International Law (Implementation of Agreements) Act 2020. In summary, after Brexit, jurisdictional questions are determined not by the Brussels Regulation but by the Hague Convention on Choice of Court Agreements (which now has the force of law in the UK),[99] article 7 of which provides as follows:

> "Interim measures of protection are not governed by [the Hague] Convention. [That] Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures."

The judge disagreed that there would necessarily be any "manifest injustice" (within the meaning of article 6(c) of the Hague Convention) to require the claimant to enforce the adjudication decision in Paris, especially as there was no evidence adduced on the relevant foreign law and court procedures.[100] However, he was satisfied that the concept of "interim measures" under article 7 of the Hague Convention is capable of expansion and "... extends to any decision that is not a final and conclusive decision on the substantive merits of the case" – this is sufficiently broad to include a summary judgment enforcing an adjudicator's decision, which is a form of interim remedy pending the final determination of the underlying dispute by litigation/arbitration.[101]

> This case provides helpful and authoritative clarification on the basis of the courts' jurisdiction when enforcing adjudication decisions arising from contracts governed by foreign law

In reaching the above conclusion, the judge also drew a helpful analogy with the position under construction contracts containing arbitration clauses – in those circumstances, a party is nonetheless entitled to enforce an adjudication decision in the courts and cannot stay the enforcement proceedings for arbitration.[102]

This case provides helpful and authoritative clarification on the basis of the courts' jurisdiction when enforcing adjudication decisions arising from contracts governed by foreign law. Although the judge left open potential arguments of injustice and/or public policy in future cases where evidence is adduced as to the inefficiency/impossibility of enforcement in a foreign court,[103] that issue is likely to be academic in any event given the exclusion of enforcement proceedings from the scope of the Hague Convention by virtue of article 7.

97 [2019] EWHC 1659 (TCC); [2019] BLR 495.
98 [2021] EWHC 356 (TCC); [2021] BLR 293.
99 Ibid, at para 13.
100 Ibid, at paras 37, 38, 54 and 55.
101 Ibid, at para 57.
102 Ibid, at para 58.
103 Ibid, at para 55.

Adjudicators' fees

It is not uncommon for adjudications to end up being an abortive exercise, either because an adjudicator resigns in the middle of the process or because the decision is later held to be unenforceable on jurisdictional and/or natural justice grounds. In such circumstances, it is understandable that the parties would be reluctant to pay and incur the abortive costs of the adjudicator's fees and expenses.

An early example of this was the case of *PC Harrington Contractors Ltd v Systech International Ltd*,[104] where the adjudicator's decisions were found to be unenforceable due to breaches of natural justice as a result of a failure to exhaust his jurisdiction in respect of defences raised by the responding party. The Court of Appeal held that the adjudicator was not entitled to his fees for producing an unenforceable decision (absent express terms to the contrary). Since then, adjudicators have typically included express terms in their terms of appointment to provide for the payment of fees irrespective of the enforceability of the decision.

It is not uncommon for adjudications to end up being an abortive exercise, either because an adjudicator resigns in the middle of the process or because the decision is later held to be unenforceable on jurisdictional and/or natural justice grounds

The issue of an adjudicator's entitlement to his fees arose again in the recent case of *Davies & Davies Associates Ltd v Steve Ward Services (UK) Ltd*.[105] On this occasion, the defendant argued that the adjudicator had abandoned his duties as there was no threshold jurisdictional issue, such that the adjudicator should not be entitled to recover the fees incurred before his resignation.

Deputy High Court Judge Roger ter Haar QC disagreed with the suggestion that the adjudicator had improperly abandoned his duties. The judge found that, on the evidence, the adjudicator was entitled to conclude that the contract was not made with the responding party in the adjudication,[106] and whilst "... the adjudicator's reasoning in deciding to resign on the basis that he had no jurisdiction when that was not an issue which the parties had referred to him was erroneous",[107] he nonetheless "... acted in accordance with what he regarded as being his duty" and was entitled to resign at any time pursuant to para 9(1) of the Scheme for Construction Contracts.[108]

In any event, the judge was unpersuaded that there was any basis for withholding payment of the adjudicator's fees. The terms of appointment provided that the adjudicator was entitled to his fees "[s]ave for any act of bad faith by the Adjudicator", but the judge was of the clear view that "... a situation such as this where an Adjudicator acting with diligence and honesty comes to the conclusion that the proper course is for him to exercise his right under para 9(1) of the Scheme to resign is not a situation within the expression 'bad faith'".[109] Furthermore, he concluded that the payment terms were not caught by the Unfair Contract Terms Act 1977 and were in any event reasonable.[110]

This latest TCC decision will come as a relief to adjudicators and provide a degree of security in respect of their fees where appropriate provisions have been included in the terms of appointment. The courts will obviously be reluctant to rewrite the contractual bargain between an adjudicator and the parties, and parties should think twice in the future before seeking to challenge an adjudicator's fees.

That being said, it should not be assumed that the TCC will not make a finding of bad faith in a future case with an appropriate set of facts, and there is no carte blanche for adjudicators to act "willy nilly" during an adjudication. As a matter of good practice, adjudicators should seek submissions from the parties on jurisdictional matters, rather than unilaterally resigning without any consultation (a point which the judge expressly highlighted in his judgment).[111]

104 [2012] EWCA Civ 1371; [2013] BLR 1.
105 [2021] EWHC 1337 (TCC); [2021] BLR 542.
106 Ibid, at paras 51 to 55.
107 Ibid, at para 63.
108 Ibid, at paras 66 and 67.
109 Ibid, at para 79.
110 Ibid, at paras 84 and 85.
111 Ibid, at para 60.

TOPICAL CONTRACTUAL ISSUES

Contract formation and interpretation

One of the defining characteristics of a typical construction, infrastructure or energy dispute is the complexity of the contractual framework, which is only matched by the contractual conundrums often encountered. In particular, problems often arise at a very early stage of the analysis in the context of contract formation, due to the prevalence of informal oral contracts, letters of intent (LOI), and written contracts being finalised after the commencement of works.

Readers will no doubt recall the battle of the forms which the TCC and the Court of Appeal had to grapple with in *Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly called CV Buchan Ltd)*,[112] which was an excellent illustration of the difficult questions of contract formation arising from construction and engineering projects. In 2021, the TCC had the opportunity to determine another dispute regarding competing contractual terms in *Balfour Beatty Regional Construction Ltd v Van Elle Ltd*,[113] which is an interesting case study for parties and legal practitioners alike.

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This was a trial of preliminary issues, arising from the construction of a sub-sea cable manufacturing facility in Newcastle upon Tyne. Van Elle was Balfour Beatty's piling sub-contractor, and the piling works for part of the facility (known as the "North Carousel") began to suffer from excessive settlement shortly after installation. As part of its defence against Balfour Beatty's claim in respect of the piling works, Van Elle argued that the North Carousel piling works were (unlike the rest of the works) governed separately by a subcontract based on its May 2012 quotation and its standard terms and conditions (including, among other things, certain wide-ranging limitation clauses). A key issue therefore turned on the formation of the subcontract and the applicable contractual terms.

Waksman J began by observing that "… the court must consider objectively whether the alleged contract has been formed. The subjective intent of the parties, even if shared, is irrelevant. But in the context of contractual formation, subsequent events can be taken into account in ascertaining whether and if so what contract was made".[114] The emphasis on the objective analysis is significant, as it explains why some of the parties' witness evidence (for example, as to the contractual "comfort" allegedly provided by Van Elle's quotation and/or Balfour Beatty's LOI, respectively)[115] was held to be irrelevant and/or inadmissible.

The judge then undertook a detailed interpretative analysis of the competing contractual documents relied on by each party, in order to ascertain what were the terms which governed the North Carousel works. It was clear from the evidence that Van Elle wanted a contractual commitment from Balfour Beatty in the form of a limited order or a LOI, and that the commitment sought was meant to cover the North Carousel works which were the first to commence on site. The LOI therefore constituted Balfour Beatty's offer to pay for, among other things, the North Carousel works, and that offer was accepted by Van Elle in correspondence.[116]

Although Van Elle contended that the LOI excluded the North Carousel works, relying in particular on the lack of specific reference to the North Carousel works in the LOI and the reference to a financial ceiling of £363,600 which was tied to an earlier March 2012 quotation for other parts of the works, Waksman J held that this was nonetheless capable of covering all the works including the North Carousel given that the LOI expressly permitted increases to the financial ceiling by consent – the fact that the LOI could have been worded more clearly did not act as a "trump card" in Van Elle's favour.[117] Even though the numbered documents referenced in the LOI did not include drawings/specifications for the North Carousel works, Waksman J again placed great emphasis

112 [2016] EWHC 2509 (TCC); (2016) 33 BLM 10 3. Reversed on appeal in [2018] EWCA Civ 2222; [2019] BLR 27.
113 [2021] EWHC 794 (TCC); (2021) 38 BLM 05 11.
114 Ibid, at para 77.
115 Ibid, at paras 97 to 100.
116 Ibid, at paras 89 to 95.
117 Ibid, at paras 122 to 126.

on the fact that the North Carousel works commenced immediately after the LOI, as well as the period covered by the schedule of valuation dates (which was consistent with the LOI covering *all* the works).[118]

Waksman J also had little difficulty rejecting Van Elle's argument that the North Carousel works were separately governed by a contract based solely on its May 2012 quotation, and he described it as "completely unrealistic".[119] This was because Van Elle was insistent on having some written confirmation or commitment from Balfour Beatty, such that other forms of acceptance (for example, implied by conduct) were not considered to be acceptable – this reinforced the status of the LOI as the basis of the parties' subcontract.[120] Above all, the subsequent invoices were highly relevant, as they were issued on the basis of a single overall subcontract expressly referrable to the LOI, and also a single project/contract number.[121]

This left one final question, namely whether the formal subcontract which was executed after the completion of the piling works nonetheless governed those works retrospectively. Waksman J held that this did indeed cover the North Carousel piling works – the LOI specifically contemplated that it would later be superseded by a formal subcontract, and the anticipated starting date was consistent with the commencement date of the North Carousel works.[122]

Crucially, although the subcontract identified the subcontract sum as £363,600 (again tied to the earlier March 2012 quotation for other works), there were express manuscript amendments which included the statement: "original subcontract sum to be considered in addition to all further works undertaken." Waksman J construed this as a sufficiently broad qualification to include any other works not covered by the quoted sum of £363,600 (ie including, among other things, the North Carousel works), and he rejected Van Elle's argument that the phrase should be artificially interpreted as being confined to further works after the draft subcontract was sent out on 23 November 2012.[123]

While any decision on contract formation and interpretation is very much specific to the facts of the case, Waksman J's recent judgment is an excellent example of the courts' emphasis on an objective and realistic analysis of the factual matrix when it comes to a battle of the forms, and it is clear that bare assertions as to a party's intention and attempts to read unwritten limitations into the documents ex post facto are unlikely to be persuasive. More generally, this case yet again highlights the perils of commencing works based on conflicting exchanges of correspondence without any formally drafted or executed contract in place. Although unlikely to be a priority in all the excitement about expediting progress on site, a lack of formality and certainty in contract formation almost always comes home to roost when a dispute arises at a later stage in the project.

It is noteworthy that in *Balfour Beatty*, there was also an argument as to whether the May 2012 quotation could have been accepted by conduct, in light of the footer in Van Elle's covering email, which stated that a contract would require a signed written document from an officer of Van Elle. Although it was unnecessary to decide this point, Waksman J observed obiter that "… this was a requirement which could be waived and in any event, it purported to govern a purported contract arising from the email itself not some underlying document supplied with it", and he gave the hypothetical example of a quotation positively accepted in writing which would most likely give rise to a concluded contract.

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This could potentially raise interesting questions in a future case where the result depends on the effect of similar "no oral agreement" provisions in covering emails, quotations and standard terms. In particular, this will need to be considered in light of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[124] (which was previously considered in the annual review for 2018), especially Lord Sumption's observations regarding the high threshold for finding a waiver of a "no oral modification" clause – the mere fact of the informal promise itself is not enough.[125]

118 Ibid, at paras 127 to 131.
119 Ibid, at para 102.
120 Ibid, at para 103.
121 Ibid, at paras 104 to 109.
122 Ibid, at para 145.
123 Ibid, at paras 147 to 157.
124 [2018] UKSC 24; [2018] BLR 479.
125 Ibid, at para 16.

Perhaps one answer is that the observations in *MWB* are strictly confined to the effect of purported oral variations to a formal written agreement where the "no oral modification" clause forms part of the parties' contractual bargain (which was the context of that case). Indeed, one can see why different considerations ought to apply where there has not been any antecedent agreement between the parties and a formality requirement is unilaterally imposed by one party – this would be consistent with previous authorities on prescribed modes of acceptance regarding the possibility of a waiver and the permissibility of equally efficacious modes of acceptance.[126]

It would be interesting to see this specific issue being considered by the TCC in a future case. In any event, parties should not assume that a footer in an email or a quotation requiring a formally signed agreement would necessarily prevent the formation of an oral contract or a contract by conduct.

Aside from the *Balfour Beatty* case in the TCC, the Court of Appeal also had the opportunity to consider a similarly thorny question relating to the incorporation and interpretation of conflicting bespoke and standard terms. In *Septo Trading Inc v Tintrade Ltd*,[127] the parties were in dispute as to the conclusiveness of an inspector's quality certificate in respect of a consignment of fuel oil – the email confirmation stated that the certificate would be binding on the parties in the absence of fraud or manifest error, but it also provided for the BP 2007 General Terms and Conditions for FOB Sales to apply "where not in conflict with the above", and the BP Terms provided that the quality certificate would not prejudice the buyer's right to bring a quality claim.

Males LJ described the law applicable to inconsistencies between specially agreed terms and the printed standard terms as "well settled".[128] After summarising the principles laid down in *Pagnan SpA v Tradax Ocean Transportation SA*[129] and *Alexander v West Bromwich Mortgage Co Ltd,*[130] Males LJ observed that the question comes down to whether the two clauses can be read together fairly and sensibly so as to give effect to both:

> "... It will be relevant to consider whether the printed term effectively deprives the special term of any effect (some of the cases describe this as the special term being 'emasculated', but in my view it more helpful to say that it is deprived of effect). If so, the two clauses are likely to be inconsistent. It will also be relevant to consider whether the specially agreed term is part of the main purpose of the contract or, which is much the same thing, whether it forms a central feature of the contractual scheme. If so, a printed term which detracts from that scheme is likely to be inconsistent with it. ..." [131]

126 See eg *A Ltd v B Ltd* [2015] EWHC 137 (Comm).
127 [2021] EWCA Civ 718.
128 Ibid, at para 18.
129 [1987] 2 Lloyd's Rep 342.
130 [2016] EWCA Civ 496.
131 *Septo Trading*, at para 28.

Applying those principles to the facts, Males LJ agreed with the judge at first instance (as a starting point) that the bespoke term intended that the quality certificate should be binding for all purposes, noting that the word "binding" was sufficient to express the meaning of finality and conclusiveness.[132] He then noted that the standard BP Term (that the certificate is only binding for invoicing purposes) effectively means that it is not binding at all.[133] This led the court firmly to the conclusion that the BP Term would deprive the bespoke term of all effect and is plainly inconsistent, and the true construction is that the certificate would be binding as per the bespoke term.[134]

It is clear that the courts will apply a pragmatic and commercial approach when faced with competing sets of inconsistent terms, and will strive to uphold the parties' bespoke bargain so as not to deprive it of its intended effect on the basis of certain standard terms which may not have been given much (if any) consideration. Although the courts will try to construe and give effect to all terms in a consistent manner, this does not mean that a strained interpretation should be adopted if there is an obvious conflict on the fact of the documents.

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Given the prevalence of informal agreements/LOIs in the construction industry, parties need to look out for any attempt by another party to incorporate its standard terms (or a standard form contract), and to ensure that the effect of such incorporation is clearly understood – this includes conclusive evidence clauses, which are some of the most common pitfalls in building and engineering contracts. After all, it is always better to iron out any inconsistencies in contractual terms at the contract negotiation stage, if only to avoid protracted disputes down the line.

132 Ibid, at paras 36 to 38.
133 Ibid, at paras 39 and 40.
134 Ibid, at paras 40 to 45.

Liquidated and ascertained damages

Since the Supreme Court decision in *Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis*[135] reformulated the test for penalty clauses back in 2015, there has been a renewed interest within the industry in liquidated damages clauses and what appears to be an increasingly limited set of circumstances where the courts would find such clauses to be inoperable or unenforceable. The general consensus is that liquidated damages clauses would usually be upheld in negotiated contracts between commercially experienced parties of comparable bargaining power.[136]

That largely remained the position until the controversial Court of Appeal decision in *Triple Point Technology Inc v PTT Public Company Ltd*,[137] concerning the applicability of a liquidated damages clause under a software contract after termination. Readers will recall from the annual review for 2019 that the Court of Appeal left open the question for a case-by-case consideration, but the *ratio* of the decision on the clause in question suggested that any liquidated damages expressly said to accrue for a period of delay up to the actual date of acceptance or completion may well be irrecoverable in the event of a termination prior to completion.

For many within the construction and infrastructure industry, this was considered to be a sea change from the orthodox position, ie liquidated damages accrued up to the date of termination would be recoverable, with any delay-related losses post-termination sounding in general damages. Jackson LJ described this orthodoxy as sometimes "artificial and inconsistent with the parties' agreement" because post-termination, "... the employer is in new territory for which the liquidated damages clause may not have made provision".[138]

Thankfully, the much-awaited final word of the Supreme Court in *Triple Point Technology Inc v PTT Public Company Ltd*[139] landed in July 2021, and in short, the Supreme Court unanimously reversed the Court of Appeal's decision and held that the liquidated damages clause in question survived the termination, providing much-needed clarification to a very important area of law.

In a detailed leading judgment, Lady Arden recognised that "[p]arties agree a liquidated damages clause so as to provide a remedy that is predictable and certain

135 [2015] UKSC 67; [2016] BLR 1.
136 Ibid, at para 35.
137 [2019] EWCA Civ 230; [2019] BLR 271.
138 Ibid, at para 110.
139 [2021] UKSC 29; [2021] BLR 555.

for a particular event …", and the Court of Appeal's approach was "inconsistent with commercial reality and the accepted function of liquidated damages".[140] In particular, she disagreed that parties had to specifically provide for the effect of a liquidated damages clause post-termination – parties must be taken to know the general law and "[t]he territory is well-trodden".[141]

Lord Leggatt similarly concluded that "… there is no reason – in law or in justice – why termination of the contract should deprive the employer of its right to recover such damages, unless the contract clearly provides for this".[142] He considered that the Court of Appeal's interpretation would incentivise a party in serious delay not to complete the works,[143] and defeat the purpose of such liquidated damages, which is to ensure certainty:

> "… I can see no reason why, in the event that the contract is terminated before the work is completed, they would wish to forgo those benefits of certainty, simplicity and efficiency in quantifying the damages in relation to delay which has already occurred. Indeed, making the right to liquidated damages for delay by the contractor conditional upon the contractor completing the work would itself introduce considerable uncertainty at the time of contracting about what sum would be recoverable if delay occurs and would thus deprive the parties of the advantage of being able to know their financial exposure from this risk in advance."[144]

Although the Court of Appeal was heavily fixated on the literal wording of the clause in question (which defined the end-point of the accrual of liquidated damages by reference to the acceptance of the works), the Supreme Court preferred a more purposive approach. In Lady Arden's view, "[i]t would be sufficient to interpret the words 'up to the date PTT accepts such work' as meaning 'up to the date (if any) PTT accepts such work' …",[145] as the Court of Appeal's interpretation "… in effect threw out the baby with the bathwater".[146] This interpretive approach will most likely be applicable to similarly worded liquidated damages clauses in other contracts.

For readers who paid particularly close attention to the Court of Appeal's analysis of the previous authorities on this topic, it is noteworthy that the Supreme Court is much less enthused in this regard and noted that "[t]hey all turn on their particular circumstances".[147] In particular, Lady Arden observed that *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corp Ltd*[148] was distinguishable on the facts in any event, because the liquidated damages in that case were being claimed up to the actual completion of the works by a substitute contractor.[149]

The default position is now clear – where parties provide for liquidated damages to apply until completion of the works, liquidated damages will normally accrue up to the date of termination even if completion has not taken place, and it is unnecessary to specifically provide for this in the clause. However, if parties wish to disapply liquidated damages in the event of an early termination, then this will need to be clearly and expressly spelt out in the contract.

Parties to construction or other contracts containing liquidated damages clauses will no doubt welcome the clarity and certainty restored by the Supreme Court's latest decision – this should apply to both employers and contractors, as all parties stand to gain with the certainty and predictability of an effective liquidated damages clause. There is generally no need for parties to panic about the effect of existing liquidated damages clauses and/or to expressly provide for the effect of termination in future contracts (subject always to the caveat that the contractual language must be considered carefully in each case).

It is not often that one gets two significant judgments on the application of liquidated damages clauses, but shortly after *Triple Point*, we also saw the arrival of the TCC's decision in *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd*,[150] which concerned the operability and enforceability of a liquidated damaged clause which did not contain an adequate mechanism for reducing those damages in the event of partial possession. This is of particular interest because the courts have not had the opportunity since *Cavendish* to revisit the well-known line of authorities starting from *Bramall & Ogden Ltd v Sheffield City Council.*[151]

The dispute arose from the high-profile Embassy Gardens development in Nine Elms, London, which features the famous (if somewhat controversial) 82-foot glass sky

140 Ibid, at para 35.
141 Ibid, at para 35.
142 Ibid, at para 39.
143 Ibid, at para 81.
144 Ibid, at para 80.
145 Ibid, at para 38.
146 Ibid, at para 48.
147 Ibid, at para 39.
148 [1913] AC 143.
149 *Triple Point*, at paras 42 to 47.
150 [2021] EWHC 2207 (TCC); [2021] BLR 687.
151 (1985) 29 BLR 73.

pool some 115 feet above the ground. EWB sought Part 8 declarations to the effect that the liquidated damages were penal, void and/or unenforceable as a result of the partial possession, such that it was entitled to claim general damages in a considerably greater sum which was not limited by reference to the liquidated damages provisions. Dobler, on the other hand, maintained that the liquidated damages clause was enforceable. It is worth noting that each party's respective position in the previous adjudications was the polar opposite of their arguments before the TCC.

O'Farrell J adopted the current test for penalty clauses as formulated by the Supreme Court in *Cavendish Square*,[152] and noted that "[t]he starting point for the court is to construe the relevant provisions" based on the well-established principles of interpretation.[153] She also emphasised that "[i]t is important not to elevate statements of general principle into an inflexible rule of law", having particular regard to commentary in the leading construction textbooks.[154]

After summarising the previous authorities on this issue[155] (including *Bramall* and two other later authorities),[156] O'Farrell J pointed out that "... the courts did not reject, as automatically fatal, the concept of one rate of liquidated damages for late completion of the works where there is sectional completion or partial possession; rather, the express provisions in each case simply did not work because of errors in drafting".[157] On this basis, the judge distinguished the previous cases and concluded that the contract in question did not give rise to any difficulties, as the provisions were reasonably clear and operable – liquidated damages would simply apply in full irrespective of partial possession.[158]

The question ultimately was whether the liquidated damages would become penal and therefore unenforceable. O'Farrell J was firmly of the view that the clause would not be unconscionable, extravagant or exorbitant so as to amount to a penalty because: (i) the contract was negotiated with the benefit of legal advice, and the court should be cautious about interfering with a contractual allocation of risk; (ii) EWB had a legitimate interest in enforcing the obligation to complete the works as a whole and avoiding the inevitable impact of late completion; (iii) quantification of damages for partial completion of the works would be difficult, and the parties avoided such difficulties by fixing liquidated damages for late completion of the whole works; and (iv) there was no evidence that the level of damages was unreasonable or disproportionate to the likely losses in the event of late completion of the work in any one or more of the blocks.[159]

O'Farrell J's decision is a very important one, as parties and legal practitioners can no longer assume that the absence of a contractual mechanism for reducing damages in the event of sectional completion or partial possession would necessarily be fatal to a liquidated damages clause. The courts are likely to strive to uphold liquidated damages provisions in such circumstances, unless the provisions are truly inoperable on their proper construction (for example, because the rate of liquidated damages are pro-rated by reference to the amount of outstanding works in the incomplete sections but there is no clear demarcation of the relevant sections) or there is strong evidence that the liquidated damages are unconscionable or extravagant (which is a very high threshold indeed).

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Interestingly, O'Farrell J went on to discuss two further issues which did not really arise in *Eco World* in light of the upholding of the liquidated damages provisions, presumably because she has had the benefit of full argument and the issues were of wider importance to the industry.

First, O'Farrell J rejected Dobler's alternative argument that there was an implied term to reasonably exercise the contractual discretion to state an alternative rate of

152 *Eco World*, at paras 50 to 53.
153 Ibid, at para 54.
154 Ibid, at para 68.
155 Ibid, at paras 70 to 73.
156 Namely *Avoncroft Construction Ltd v Sharba Homes (CN) Ltd* [2008] EWHC 933 (TCC) and *Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd* [2004] EWHC 3319 (TCC).
157 *Eco World*, at para 74.
158 Ibid, at para 75.
159 Ibid, at paras 79 to 82.

liquidated damages. As a matter of construction, there was an absolute contractual right to deduct liquidated damages at the full rate stipulated in the contract, and the court would be reluctant to intervene.[160] In any event, the contract contained no mechanism for determining any reasonable level of reduced damages, nor did it prescribe any factors that should be taken into account.[161]

Secondly, even if the liquidated damages clause were considered to be inoperable, O'Farrell J observed that it could nonetheless operate as a limitation of liability in these circumstances, because "... the objective understanding of the parties in the commercial context of the Contract would be that the provision served two purposes: first, to provide for, and quantify, automatic liability for damages in the event of delay; second, to limit Dobler's overall liability for late completion to a specific percentage of the final contract sum".[162]

The above dicta plainly turned on the particular wording/structure of the provisions in question, but there are important general lessons to be learned. The courts would generally be reluctant to salvage an otherwise uncertain/inoperable liquidated damages clause by way of implied terms, particularly implied terms as to good faith or reasonableness in the exercise of discretionary powers. Moreover, even if liquidated damages are unenforceable, the courts may well uphold an agreed cap for liquidated damages as a cap on delay-related damages generally (including general damages). Draughtsmen of future contracts should therefore take care to ensure that liquidated damages clauses and liability caps are suitably worded in order to avoid any unintended consequences.

Contractual notice requirements

Another topical issue which often arises in construction, infrastructure and energy disputes (be it about delay, variations, or defects) is the question of notice and formality requirements under the relevant contract. These provisions prescribe specific deadlines and formats for claims and notices under the contract, non-compliance with which could lead to a claim being contractually barred if the requirements take the form of conditions precedent.

Any legal practitioner experienced in construction and infrastructure disputes would therefore have little hesitation in emphasising the importance of complying with contractual notice requirements. A recent illustration of the problems created by loose compliance with notice requirements can be found in the TCC's decision in *Transport For Greater Manchester v Kier Construction Ltd (t/a Kier Construction – Northern)*,[163] which considered whether a valid notice of dissatisfaction was given in respect of an adjudication decision under a NEC3 Engineering and Construction Contract.

Clause W2.4(2) of the NEC3 Contract required a notice of dissatisfaction to be given within four weeks of an adjudication decision, in order to prevent the decision from becoming final and binding. Clause WI 920 of the Works Information expressly required all communications to be undertaken using the project extranet, and clause 13.2 provided that a communication would have effect when it was received at the last address notified by the recipient for receiving communications or, if none was notified, at the address of the recipient stated in the contract data.

Kier argued that there was no valid notice of dissatisfaction because Transport for Greater Manchester (TfGM)'s correspondence was not sent to the right address, was not separated from other communications, did not state that it intended to refer a matter to the court, and/or did not specify the matters it was dissatisfied with.[164] In particular, reliance was placed on Edwards-Stuart J's decision in *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd*,[165] where it was concluded that compliance with the mode of delivery specified in clause 13.2 is the only means of achieving or securing effective delivery of a communication under the contract because the communication only takes effect when it is received at the prescribed address.[166]

Adopting the analysis in *Anglian Water* as a starting point, O'Farrell J noted that clause 13.2 only stipulated the default position if no other address was identified for receiving communications. In this particular case, the parties agreed an alternative means of communication in WI 920, which constituted the last address notified at the start of the project for receiving communications.[167] In other words, this displaced the default requirement to send communications to the addresses stated in the contract data.

Thereafter, Kier's notice of adjudication and referral notice gave the address and contact details of its legal representative (Walker Morris LLP) for the purpose of

160 Ibid, at para 93.
161 Ibid, at para 95.
162 Ibid, at para 116.
163 [2021] EWHC 804 (TCC); [2021] BLR 431.
164 Ibid, at para 30.
165 [2010] EWHC 1529 (TCC); (2010) CIL 2873.
166 Ibid, at para 49.
167 *Transport for Greater Manchester*, at paras 35 to 38.

the adjudication, and TfGM did the same with its own legal representative (Pannone Corporate). Since no objections were raised by the parties at the time about this arrangement, these became the last addresses notified by each party for receiving communications in connection with the adjudication, and TfGM correctly sent its letter of dissatisfaction to Walker Morris.[168]

Regarding the format and contents of the letter, O'Farrell J considered that it recorded TfGM's disagreement with the adjudicator's decision, such that it was sufficient to constitute a valid notice of dissatisfaction.[169] The judge emphasised that the contract was not prescriptive in any way as to the form of the notice, and so the notice simply had to be clear and unambiguous:

> "The Contract did not stipulate the form of words that had to be used, or the level of detail that was required in any notice of dissatisfaction. The purpose of the notice was to inform the other party within a specified, limited period of time that the adjudication decision was not accepted as final and binding. A valid notice would have to be clear and unambiguous so as to put the other party on notice that the decision was disputed but did not have to condescend to detail to explain or set out the grounds on which it was disputed."[170]

As a counsel of prudence, it is always advisable to carefully formulate a notice in accordance with the contractual provisions, by specifying the relevant clauses and matters relied on, adhering to the prescribed deadlines, and sending it to the correct recipients and addresses

O'Farrell J was also not impressed by Kier's argument that the notice was not sent separately from other communications, given that it was a short letter which focused on TfGM's intention to refer the dispute to the court, and the reference to payment of the sums awarded by the adjudicator arose out of the same matter and did not amount to a separate notification requiring a separate communication.[171]

It is clear that the courts are reluctant to construe notice requirements too strictly so as to preclude a party from reopening an adjudication decision and seeking a final determination from the court on what may well be good claims/cross-claims – this is reminiscent of Akenhead J's approach of construing notice requirements reasonably broadly for a contractor's delay claims in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*.[172]

Nevertheless, the above should not become a licence for parties to take an overly liberal approach when issuing notices – indeed, the less effort one puts into compliance, the more likely it will give rise to time-consuming and costly disputes. As a counsel of prudence, it is always advisable to carefully formulate a notice in accordance with the contractual provisions, by specifying the relevant clauses and matters relied on, adhering to the prescribed deadlines, and sending it to the correct recipients and addresses.

Given the inevitable time and financial pressures of an ongoing construction, infrastructure or energy project, it is perhaps understandable that compliance with notice requirements is not always a party's top priority when juggling various issues in the field. It is not at all uncommon for a party to have to resort to arguments of waiver and/or estoppel in the event of a non-compliance, and more often than not, such arguments run into both legal and evidential difficulties. It is therefore refreshing to see a success story in the Australian case of *Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)*,[173] where the New South Wales Court of Appeal held that the employer (Armani) was not entitled to rely on a contractual variation procedure against the contractor (Valmont's) claim for the additional costs of supplying joinery items (which were originally Armani's responsibility to supply).

The variation procedure in this case contained an express requirement to notify Armani within five business days of a purported variation, and a failure to comply would give rise to a waiver of Valmont's claim and effectively act as a time-bar. The judge in the lower court held that Armani was estopped from relying on the variation procedure because it had approved and paid variations during the course of the works without strict insistence

168 Ibid, at paras 39 to 41.
169 Ibid, at para 44.
170 Ibid, at para 43.
171 Ibid, at para 45.
172 [2014] EWHC 1028 (TCC); [2014] BLR 484, at para 312.
173 [2021] NSWCA 93.

on that procedure. On appeal, the question was whether Armani continued to be estopped in respect of the claim for joinery costs, even after Armani communicated to Valmont in April 2016 that it would rely on the variation procedure going forward.

Bell P (with whom the other judges concurred) concluded that the estoppel which precluded reliance by Armani on the notice requirement continued to operate after April 2016 and did not simply come to an abrupt halt, nor did it displace the assumption induced by Armani that Valmont would be compensated for the costs of the joinery.[174]

In this regard, Bell P emphasised that "[u]nless there is a sufficiently clear communicated correction or a withdrawal of the basis for an assumption which has been made by another party, considerations of conscience may dictate that an estoppel based upon that assumption has continuing effect".[175] The email correspondence in April 2016 did not suffice, as it principally concerned other works to be done to the façade (ie not the joinery items), and above all, the detriment which Valmont sustained by not giving the requisite notice at the time of Armani's direction could not have been reversed as at April 2016 (especially when the costs of the joinery were most likely already incurred by that time in order to commence the installation works on time).[176]

While each case will invariably turn on its own facts, the *Valmont Interiors* case from the land down under provides a helpful illustration of the circumstances in which estoppel may assist to ameliorate the harshness of an otherwise draconian time-bar. The evidential threshold remains a high one, but one can anticipate that on a similar set of facts, there is at least a good argument for saying that the employer should not be allowed to obtain a windfall after positively requesting extra works and raising no objections as to a contractor's non-compliance with notice requirements.

Again, one can anticipate potential hurdles arising from the Supreme Court's decision in *MWB* on the strict enforcement of "no oral modification" clauses, and it will be interesting to see how the TCC grapples with this issue in a future case. It may be that where an employer has not only informally instructed extra works, but also certified/paid for certain additional costs, that would provide a sufficient basis (beyond the informal request/promise itself) for finding an estoppel.

Again, one can anticipate potential hurdles arising from the Supreme Court's decision in *MWB* on the strict enforcement of "no oral modification" clauses, and it will be interesting to see how the TCC grapples with this issue in a future case

Having said all that, the best course of action is to always err on the side of caution and issue timeous notices and claims in accordance with the contract, if only to avoid the unnecessary complications of arguing waiver and/or estoppel after the event.

174 Ibid, at para 85.
175 Ibid, at para 93.
176 Ibid, at paras 86, 87, 96 to 106.

Principles of good faith

For readers from the common law jurisdiction, it will come as no surprise to say that the principle of good faith has been met with a lukewarm reception at best in the English courts. Although there have been glimpses of a possible revival after the well-known decision in *Yam Seng Pte Ltd v International Trade Corporation Ltd*,[177] it was not long before the courts decided to put their foot down and emphasise that "... there is no general doctrine of 'good faith' in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract",[178] as "[t]here is ... a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement".[179]

In more recent years, the courts have continued to imply duties of good faith into limited cases of relational contracts – including, for instance, the sub-postmasters' contracts with the Post Office in *Bates v Post Office (No 3)*[180] and also the 25-year private finance initiative contract for the Basildon waste treatment plant in *Essex County Council v UBB Waste (Essex) Ltd (No 2)*.[181] Outside these categories, the courts have been cautious about implying general duties of good faith (or other similar terms) into run-of-the-mill commercial contracts, including building and engineering contracts which do not fit the billing of a "relational contract".

Interestingly, the issue of good faith has cropped up on quite a few occasions in 2021, perhaps partly due to challenges thrown up by the ongoing pandemic, but also in large part because of the mounting trend of such arguments in recent times.

The continuing absence of a general principle of good faith in English law received its most high-profile treatment last year in the Supreme Court decision of *Pakistan International Airline Corp v Times Travel (UK) Ltd*,[182] a case about the limits of lawful act economic duress. The dispute concerned the commission due to Times Travel in respect of the sale of tickets for Pakistan International Airline flights. The airline company threatened to terminate its contract with Times Travel, as a result of which Times Travel agreed to enter a new contract which (among other things) waived all its commissions-based claims. It was argued that the new contract should be rescinded on the basis of lawful act economic duress.

In his leading judgment, Lord Hodge reaffirmed that "... English law has never recognised a general principle of good faith in contracting" and has instead "... relied on piecemeal solutions in response to demonstrated problems of unfairness".[183] In the absence of a general principle of good faith or a prohibition on abuse of rights, the scope of lawful act economic duress is necessarily restricted,[184] and "[i]t will therefore be a rare circumstance that a court will find lawful act duress in the context of commercial negotiation".[185]

With the above in mind, Lord Hodge confined lawful act economic duress to the limited circumstances established in the previous authorities, namely where the attempt by the party to uphold or enforce the contract was unconscionable because of that party's behaviour.[186] For instance, in *Borrelli and Another v Ting and Others,*[187] a minority shareholder dishonestly opposed/delayed a liquidator's scheme of arrangement in order to pressure the liquidators into entering a settlement agreement which waived any personal claims against him. Similarly, in *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)*,[188] the vessel owners chartered it to another party in breach of an existing charterparty but assured the original charterers that a new vessel would be provided and that any losses would be compensated, only then to pressure the charterers at the last minute to waive all claims as a condition for providing the new vessel, knowing that the shipment was becoming urgent.

Therefore, unlike Lord Burrows' dissenting opinion,[189] the majority of the Supreme Court was simply not prepared to extend the scope of lawful act economic duress to cases of "bad faith demands" (ie where A does not genuinely believe that it has a defence to the claim, but has deliberately created or increased B's vulnerability to that demand).[190] Lord Hodge was clearly concerned that this would give rise to too much uncertainty, especially in the absence of any underlying principle of good faith or inequality of bargaining power at common law to provide a basis for an extended doctrine.[191]

177 [2013] EWHC 111 (QB); .
178 *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200; [2013] BLR 265, at para 105 (Jackson LJ).
179 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494, at para 45 (Moore-Bick LJ).
180 [2019] EWHC 606 (QB).
181 [2020] EWHC 1581 (TCC).
182 [2021] UKSC 40; (2021) 38 BLM 09 1; [2021] 2 Lloyd's Rep 234.
183 Ibid, at para 27.
184 Ibid, at para 28.
185 Ibid, at para 30.
186 Ibid, at paras 10 to 18.
187 [2010] UKPC 21.
188 [2012] EWHC 273 (Comm); [2012] 1 Lloyd's Rep 501.
189 *Pakistan International*, at paras 62 to 138.
190 Ibid, at paras 45 and 46.
191 Ibid, at paras 49 and 50.

The bottom line is clear – discreditable behaviour is commonplace in commercial life, but it does not necessarily attract the court's censure, and the court will be astute not to extend other existing common law doctrines as a backdoor for surreptitiously introducing a general principle of good faith. This is wholly consistent with the English courts' historic emphasis on the freedom of contract and minimal intervention.

Discreditable behaviour is commonplace in commercial life, but it does not necessarily attract the court's censure, and the court will be astute not to extend other existing common law doctrines as a backdoor for surreptitiously introducing a general principle of good faith

The *Pakistan International* case represents one end of the spectrum in this discussion. The question of express and implied terms of good faith and reasonableness was also specifically grappled with in a number of first instance decisions, some of which have already been discussed above in a different context. The contrasting results in these decisions suggest that the fate of good faith in English law is far from settled and is in fact slowly evolving.

For instance, there was the *Dwyer* case[192] involving the force majeure clause in the "Drain Doctor" franchise agreement, where the court relied on the *Braganza* decision and readily found an implied term that the power of designation of a force majeure event must be exercised honestly, in good faith and genuinely. On the other hand, in *Eco World,*[193] O'Farrell J took the more orthodox line and rejected the alternative argument that an inoperable liquidated damages mechanism could be saved by an implied term to reasonably exercise a discretion to set a reduced rate of liquidated damages in the event of partial possession, as that would otherwise dilute an express absolute contractual entitlement.

It seems likely that the pendulum of implied duties of good faith will continue to swing in the English courts in the coming years, with such duties being accepted or rejected on a case-by-case basis, depending on the facts and the parties' contractual bargain. Parties can expect a high threshold for establishing such implied terms, as the courts will not be relaxing the stringent test of necessity for the implication of terms.

The above approach to implied terms of good faith can be contrasted with the treatment of express terms imposing a duty of good faith. In the latter case, the courts may well feel much more emboldened to enforce standards of good faith and hold a party to account for commercially sharp behaviour. This direction of travel can perhaps be seen in the Scottish case of *Van Oord UK Ltd v Dragados UK Ltd,*[194] which provides an interesting case study on the application of the express duty of mutual trust and cooperation (clause 10.1) in a NEC3 contract.

The facts will sound familiar to anyone within the construction industry. Van Oord was Dragados' sub-contractor for the dredging works at Niggy Bay. Subsequently, Dragados purported to instruct the omission of a third of the dredging works (pursuant to the compensation event provisions) and transfer them to other sub-contractors, in order to reduce the subcontract sum payable by 49 per cent. Van Oord argued that the omission of those works in order to instruct third parties to carry them out instead amounted to a breach of contract.

In the Outer House, Lord Tyre concluded that Dragados was entitled to reduce the sums payable to Van Oord based on the compensation event provisions. On appeal, the Inner House held that there was in fact a breach of the duty of mutual trust and cooperation under clause 10.1 of the NEC3 contract on the facts, such that Van Oord was entitled to be paid as per the original contractual rates and prices. The court was firmly of the view that "... clause 10.1 is not merely an avowal of aspiration. Instead, it reflects and reinforces the general principle of good faith in contract ...", citing the well-established contractual principles that a contracting party is not usually entitled to take advantage of its own breach and that clear language is required to place a party completely at the mercy of the other.[195]

Accordingly, the Inner House held that clause 10.1 and the provisions for instructing a change/omission to the works were "counterparts" – Dragados could not seek a

192 *Dwyer*, at para 263.
193 *Eco World*, at paras 84 to 96.
194 [2021] CSIH 50; (2021) 38 BLM 10 8.
195 Ibid, at para 19.

price reduction unless it fulfilled its duty to act in a spirit of mutual trust and cooperation,[196] as the price reduction provisions only applied to "a lawful change" which was in accordance with the subcontract and excluded instructions issued in breach of contract.[197]

Although the result in the *Van Oord* case was very much driven by the circumstances and unlawful nature of the attempted transfer of works to other subcontractors, it is still a remarkable instance of a common law court characterising age-old canons of contract law as part of a "general principle of good faith". The express duty under clause 10.1 of the NEC contract gave the court the vehicle to expressly recognise and give effect to these principles.

It is probably safe to say that the English courts are unlikely to be as forthright in the recognition of a "general principle of good faith", and indeed, query whether that is necessary when the *ratio* of the Inner House was very much based on established common law principles. Nevertheless, for parties seeking to rely on an express contractual duty of cooperation or good faith, the *Van Oord* decision is a helpful illustration of the contents of that duty and how it might overlap with other common law principles – if deployed appropriately on the right set of facts, there is room for such an express term to materially affect the outcome of a case. Only time will tell whether the TCC can be persuaded to follow the Inner House's approach in a future case.

Exclusion/limitation of liability clauses

As already mentioned above in the discussion of the *Westminster City Council* case,[198] the courts have consistently been emphasising in recent years that there are no special rules or presumptions applicable to the interpretation of exclusion/limitation of liability clauses. The focus is very much on construing the parties' contractual language and giving effect to it as far as practicable, and it would only be in very rare cases that antiquated canons such as the contra proferentem principle would be applied as a last resort to resolve a patent ambiguity[199] – indeed, one struggles to find a recent application of such canons.

This approach to exclusion/limitation clauses has been given yet further impetus, this time by the highest court of the land in the *Triple Point* decision. In addition to the liquidated damages issue which has already been discussed above, the Supreme Court was also asked to consider the scope of (among other things) an exception from a liability cap for negligence, and whether the exception applies to negligent breaches of contractual duties and not only independent torts.

The majority of the Supreme Court (with Lord Sales and Lord Hodge dissenting) considered that the clause in question excluded claims for breaches of contractual duties from the scope of the liability cap. Approaching this question as a typical exercise of interpretation, Lady Arden's starting point was that "… the word 'negligence' has an accepted meaning in English law …" which "… covers both the separate tort of failing to use due care and also breach of a contractual provision to exercise skill and care …", unless some strained meaning could be given to the word.[200]

Lady Arden took into account the overall framework of the contract and considered that it contained not only obligations to provide services with reasonable care, but also strict and absolute warranties that the software would be defect-free and functionally compliant – this distinction meant that the liability cap could meaningfully apply to pure breaches of contractual warranties but not to breaches of contractual duties.[201] In reaching this conclusion, she rejected the contention that "negligence" referred only to independent torts such as property damage and personal injury, as the contract did not involve physical works by attendance at the premises and the examples given were artificial.[202]

Lord Leggatt agreed with Lady Arden's conclusion, and similarly focused on the natural and ordinary meaning of the word "negligence", taking into account also the other exceptions for "gross negligence" and "wilful misconduct" which similarly contemplate contractual defaults.[203]

His additional observations based on the need for clear words are of particular interest. After noting that "[t]he approach of the courts to the interpretation of exclusion clauses (including clauses limiting liability) in commercial contracts has changed markedly in the last 50 years",[204] he recognised the presumption against derogations from parties' normal rights and obligations at common law:

196 Ibid, at para 23.
197 Ibid, at para 29.
198 [2021] EWHC 98 (TCC), at para 74.
199 See eg *Persimmon Homes Ltd v Ove Arup & Partners Ltd and Another* [2017] EWCA Civ 373; [2017] BLR 417, *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372; [2016] BLR 360 and *Nobahar-Cookson and Others v The Hut Group Ltd* [2016] EWCA Civ 128.
200 *Triple Point*, at para 52.
201 Ibid, at paras 53 to 55.
202 Ibid, at paras 56 and 57.
203 Ibid, at paras 99 to 103.
204 Ibid, at para 107.

> "... It also remains necessary, however, to recognise that a vital part of the setting in which parties contract is a framework of rights and obligations established by the common law (and often now codified in statute). ... Although its strength will vary according to the circumstances of the case, the court in construing the contract starts from the assumption that in the absence of clear words the parties did not intend the contract to derogate from these normal rights and obligations."[205]

Lord Leggatt's judgment confirms the courts' general reluctance to resort to the contra proferentem principle

Lord Leggatt reinforced his conclusion by observing that "[t]o the extent that the process has not been completed already, old and outmoded formulas such as the three-limb test in *Canada Steamship Lines Ltd v The King* [1952] AC 192, [at p] 208, and the 'contra proferentem' rule are steadily losing their last vestiges of independent authority and being subsumed within the wider *Gilbert-Ash* principle".[206] This is entirely consistent with the judicial direction of travel in recent years.

Lord Leggatt's judgment confirms the courts' general reluctance to resort to the contra proferentem principle. In future cases, parties wishing to confine the scope of an exclusion or limitation clause should probably focus on the parties' normal rights and remedies and the need for clear words to vary the usual position. From a drafting perspective, care should be taken to be precise about the meaning and definition of the liability being excluded/limited and also of any exceptions therefrom, especially when it comes to any distinctions being drawn between contractual and tortious liabilities.

A further reaffirmation of the courts' general approach to interpreting exclusion/limitation clauses can be found in *Mott Macdonald Ltd v Trant Engineering Ltd*,[207] where the TCC had to decide whether the liability cap, exclusion clause and net contribution clauses in a professional services agreement could apply to fundamental, wilful, or deliberate breaches of contract.

After a detailed analysis of the competing authorities on the interpretation of exclusion/limitation clauses (both generally and in the context of a fundamental breach),[208] HHJ Eyre QC concluded that "[e]xemption clauses including those purporting to exclude or limit liability for deliberate and repudiatory breaches are to be construed by reference to the normal principles of contractual construction without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability".[209] Like Lord Leggatt in *Triple Point*, however, HHJ Eyre QC also recognised the need for clear words:

> "... The court is to construe the contract so as to give effect to the parties' intention as disclosed by the language read in context. In that exercise the court is to be conscious that the exclusion of a liability which would otherwise and ordinarily arise is to that extent a departure from the norm (the point made by Lord Diplock in the passage quoted at para 34 above). That has the consequence that it will be inherently less likely than otherwise that a clause was intended to operate to exclude liability unless it is clear from the language when properly interpreted in context that it has that effect. It is from this understanding that the references to the need for clear words derive. In the absence of clear words the court is unlikely to conclude that a clause should properly be construed as excluding liability because in those circumstances a departure of this kind from the norm is unlikely to have been intended. ..."[210]

On the facts, the judge concluded that the clauses are in clear terms and are capable when read naturally of applying to the alleged fundamental/deliberate/repudiatory breaches, and importantly, these formed part of a bespoke agreement entered into between two commercial entities to resolve an existing dispute and avoid a renewed dispute.[211] Interestingly, the judge observed that "[i]t will be a rare contract where no criticism can be made of the quality of the drafting", and he was not persuaded by the alleged infelicities and imperfections in the drafting.[212]

Further, the judge did not consider that the limitation clause would render the contract nugatory or turn it into a mere declaration of intent, as a breach would still give rise to potential liability up to the cap of £500,000, which

205 Ibid, at para 108.
206 Ibid, at para 111.
207 [2021] EWHC 754 (TCC); [2021] BLR 440.
208 Ibid, at paras 30 to 63.
209 Ibid, at para 64.
210 Ibid, at para 65.
211 Ibid, at paras 80, 85 and 86.
212 Ibid, at para 81.

is still an adverse consequence albeit one which has been mitigated after the parties' "balancing exercise" during contract negotiations.[213] It is clear that the court is reluctant to disturb a bespoke and express allocation of risks reached by parties in a commercial transaction, and this all boils down again to the primacy of the freedom of contract.

> There will be no special rule or presumption to act as a silver bullet for avoiding the effect of an exclusion or limitation clause, and if the words are sufficiently clear and broad, it is most likely that the courts would simply give effect to the clause as drafted

The above cases provide ample incentive for parties to take a closer look at all exclusion/limitation clauses at the time of contract. There will be no special rule or presumption to act as a silver bullet for avoiding the effect of an exclusion or limitation clause, and if the words are sufficiently clear and broad, it is most likely that the courts would simply give effect to the clause as drafted (subject to any arguments based on the Unfair Contract Terms Act 1977 or the Consumer Rights Act 2015). This makes it all the more important to ensure that the wording of such clauses is carefully reviewed and refined, before one signs their name on the dotted line.

Dispute resolution clauses

In light of the courts' emphasis on upholding the parties' contractual bargain and encouragement of the use of alternative dispute resolution (ADR), it is now well-established in the authorities that dispute resolution clauses based on a sufficiently clear and precise procedure would be readily enforced by the courts, and where the provisions amount to conditions precedent, parties would not be allowed to litigate/arbitrate a dispute by flouting an agreed antecedent procedure.

Many readers will recall the seminal case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd,*[214] where Teare J upheld a dispute resolution clause which required the parties to seek to resolve a dispute by friendly discussions in good faith and within a limited period of time before the dispute could be referred to arbitration. This was followed, for instance, in O'Farrell J's decision of *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd*,[215] which was covered in the annual review for 2019 and concerned a requirement to use the Centre for Effective Dispute Resolution Model Mediation Procedure to attempt to reach a settlement prior to litigation.

One interesting question arising from this line of authorities is whether a contract can expressly require a party to adjudicate first before commencing legal/arbitral proceedings, even though the HGCRA itself does not mandate parties to adjudicate a dispute as a condition precedent. This question was unequivocally answered in the affirmative in 2021 by two Scottish decisions of the Outer House, both of which related to Option W2 of the NEC3 form of contract.

First, in *The Fraserburgh Harbour Commissioners v McLaughlin & Harvey Ltd*,[216] the employer brought a claim for defective works in the courts without first referring the dispute to adjudication. Clause W2.4(1) of the contract provides that "[a] Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract", and the stipulated tribunal was arbitration. The employer argued that these provisions did not preclude the court from entertaining the suit, and that clear words would be required to oust the court's jurisdiction.

Lady Wolffe roundly rejected those contentions. To begin with, although the employer argued that the court retained the jurisdiction to, for example, secure

213 Ibid, at para 83.

214 [2014] EWHC 2104 (Comm); (2014) 31 BLM 9 4; [2014] 2 Lloyd's Rep 457.
215 [2019] EWHC 2246 (TCC); [2019] BLR 576.
216 [2021] CSOH 8.

the production of documents and make other interim orders in support of an arbitration, none of those limited ancillary purposes were being pursued in this case as there is no ongoing arbitration, such that "[t]here would be no live purpose which the present action could serve" and no grounds for a sist (ie a stay) of proceedings.[217]

On the scope and effect of clause W2.4, Lady Wolffe was of the firm view that it did not oust the court's jurisdiction, as "... it simply requires that a precondition to resort to the 'tribunal' of choice ... is that there is first an adjudication on the matter in dispute ...",[218] and "... it is clear from the language used as well as its interrelationship with other parts of Clause W4.2, that these provisions were intended to be definitive as to the means for determining any disputes between the parties and the sequence in which they were to be taken".[219] The statutory right to adjudicate under the HGCRA formed part of the crucial contractual background, and Lady Wolffe considered that the employer's approach would also cut across this statutory right.[220]

A very similar issue arose in *Greater Glasgow Health Board v Multiplex Construction Europe Ltd and Others*,[221] where the pursuer again sought to argue in the Outer House that clause W2 of the NEC3 contract did not preclude the court proceedings which had been commenced, as the parties would most likely return to court for a final determination of the dispute and the parties could obtain interim orders (for example, for document production) in the meantime.

Lord Tyre cited Lady Wolffe's decision in *The Fraserburgh* with approval and agreed that clause W2.4 was a contractual bar on resorting to litigation or arbitration without first referring the dispute to adjudication.[222] On that basis, he further concluded that the circumstances were "... indistinguishable from the case in which court proceedings were raised despite the agreement of parties to have their disputes resolved by arbitration", such that the court was deprived of jurisdiction to inquire into and decide the merits of the case until the adjudication process has concluded.[223] The result was that the court action was sisted to await the outcome of the adjudication.[224]

It is noteworthy that Lord Tyre observed in his opinion that it was inaccurate to characterise clause W2.4 as a condition precedent, as a condition precedent has to be a contractual term of such materiality that its non-fulfilment amounts to a discharge of the contract and liberates the other party from its obligations.[225] This is perhaps an overly restrictive view of the concept of conditions precedent, at least for the purposes of English law, as the English courts have long accepted that suitably worded provisions such as contractual notice requirements and time-bars are in the nature of conditions precedent. In any event, this is somewhat academic given that the end-result is that the parties must abide by the sequence prescribed by the dispute resolution clause.

> Before embarking on any litigation or arbitration, parties and their legal representatives must ensure that they have considered and complied with all mandatory steps for dispute resolution, be it negotiation, mediation, adjudication or otherwise

These recent Scottish decisions from the Court of Session are instructive for parties to construction and engineering contracts with some form of a "cascade" dispute resolution procedure consisting of (among other things) adjudication, and this is not confined to NEC3 contracts. An English court seized with the same question is most likely going to reach the same conclusion and hold the parties to an express dispute resolution clause which is worded like clause W2.4. Before embarking on any litigation or arbitration, parties and their legal representatives must ensure that they have considered and complied with all mandatory steps for dispute resolution, be it negotiation, mediation, adjudication or otherwise.

217 Ibid, at paras 29 and 30.
218 Ibid, at para 31.
219 Ibid, at para 33.
220 Ibid, at paras 34 and 35.
221 [2021] CSOH 115.
222 Ibid, at para 22.
223 Ibid, at para 28.
224 Ibid, at para 35.
225 Ibid, at para 32.

DEVELOPMENTS IN FIDIC CONTRACTS

The past year has seen two interesting developments from the Federation Internationale des Ingenieurs-Conseil (International Federation of Consulting Engineers or FIDIC) for the 1999 and 2017 suites of standard form contracts.

First, in November 2021, FIDIC launched its first Climate Change Charter, which is a call to action for the global engineering community to achieve net zero and support the climate change goals agreed at the "COP26" United Nations Climate Change Conference 2021. This is a groundbreaking document for the international construction and engineering industry, as it provides guidance on the responsibilities of various stakeholders (including FIDIC member associations, project teams, companies, and individual professional engineers) can play a role in mitigating the industry's impact on the environment and achieving sustainable development.

The aim of the charter is to get the industry and its stakeholders to reduce emissions, reduce embedded and operational carbon emissions in building and infrastructure projects, and support climate change adaptation through mitigation and design of disaster or event resilient infrastructure. To do so, the charter sets out the proposed actions which each category of stakeholders is encouraged to commit to on a corporate and also an everyday level.

For instance, engineering and consulting companies are encouraged to invest in staff and other resources to enable all schemes and projects to be designed to achieve net zero emissions, and to incorporate latest developments in renewable and decentralised energy into power assets and infrastructure components. On an operational level, they are also encouraged to develop a net zero and climate adaptation strategy, work with utilities providers to switch to clean energy sources, and adopt a science-based approach to decarbonising operations and supply chains as a whole in line with the Greenhouse Gas Protocol.

This charter is a first important step in the right direction towards a unitary and global approach to climate-conscious design and decision making within the industry generally. It would be interesting to see in the coming months the level of uptake it receives in different countries and cultures, and the manner in which these undertakings will be implemented in live projects. The crucial point is that the impetus for sustainable and net zero development should not die down with the hype around COP26, as climate change is an ongoing issue which becomes more pressing by the minute. It has to be seen as a worthwhile long-term investment, and there is no better time to start than now.

The second key development came in December 2021, when FIDIC issued its new Short Form of Contract, the Green Book, which is recommended for use on smaller value projects, but it is also often adopted in higher value projects and is preferred for its conciseness. The first edition published in 1999 was only 10 pages long, but the new edition has now bulked up to 26 pages (which is still shorter than many other standard forms in comparative terms).

The new Green Book now incorporates some of the well-known features found in the FIDIC Red and Yellow Books, including separate claims and variations procedures, take over certificates, defects notification periods, provisions on intellectual property, confidentiality and professional indemnity insurance, limitations of liability, and (perhaps more controversially) the inclusion of the role of engineer as a neutral and independent administrator of the contract. These changes helpfully bridge the gap between the various FIDIC forms of contract, albeit at the slight expense of brevity.

> The potential downside, of course, is that a contractor may not recover its actual losses if the costs of running and supervising the project increase over the life of the project due to unforeseen circumstances and changes to the complexity of the works

Of particular note are the novel liquidated damages provisions for a contractor's prolongation costs attributable to extensions of time granted by the employer for compensable delay, based on a daily rate calculated in accordance with the certified value of works done and the average weight of on and offsite overheads per day. This is an interesting approach, which may well start to gain traction within the industry,

as the quantification of prolongation costs based on preliminaries costs is often not a straightforward exercise depending on a company's internal accounting system and the amount of records available.

In practice, in the event of a dispute, it is common for quantity surveying experts in a construction litigation or arbitration to conduct a sampling exercise on a contractor's cost ledgers and documentary records in order to agree an average daily rate to be applied per day of non-culpable delay. Having this exercise completed and agreed at the start of the project based on a contractor's tender estimate of its preliminaries and overheads may well provide greater certainty in terms of risk allocation and the avoidance of time-consuming and costly disputes over quantum.

The potential downside, of course, is that a contractor may not recover its actual losses if the costs of running and supervising the project increase over the life of the project due to unforeseen circumstances and changes to the complexity of the works. Parties will have to balance the commercial and financial factors involved in each project to decide whether this is a suitable mechanism to include in the contract, and it will be interesting to see whether other non-FIDIC standard and/or bespoke forms of contract begin adopting similar mechanisms as well.

PROFESSIONAL NEGLIGENCE

It is not every year that the Supreme Court hands down two related decisions on fundamental principles of negligence. In 2021, the Supreme Court redefined the proper test for analysing and determining the scope of a professional person's duty of cate at common law, in the decisions of *Manchester Building Society v Grant Thornton UK LLP*[226] and *Khan v Meadows.*[227] The former concerned an accounting firm's erroneous advice on the application of hedge accounting to certain long-dated interest rate swaps, and the latter was a clinical negligence case arising from a doctor's failure to advise on the need for a genetic test to ascertain whether a patient carried a haemophilia gene.

The Supreme Court began by restating the six questions which need to be asked to determine the quantum of a defendant's liability for the alleged negligence,[228] namely:

(1) Is the harm which is the subject matter of the claim actionable in negligence?
(2) What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care?
(3) Did the defendant breach his or her duty by his or her act or omission?
(4) Is the loss for which the claimant seeks damages the consequence of the defendant's act or omission?
(5) Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care?
(6) Is a particular element of the harm for which the claimant seeks damages irrecoverable because it is too remote, because there is a different effective cause, or because the claimant has mitigated his or her loss or has failed to avoid loss which he or she could reasonably have been expected to avoid?

Both *Manchester Building Society* and *Khan* started by focusing on questions 2 and 5 above. Question 2 was referred to as the "scope of duty" question, and Lord Hodge and Lord Sales (who gave the leading judgment for the majority of the court) began by observing that "... it is often helpful to ask the scope of duty question before turning to questions as to breach of duty and causation", such as in more difficult cases where an auditor is said to have owed a duty of care to a would-be investor who is not his/her immediate client.[229]

226 [2021] UKSC 20; (2021) 38 BLM 07 1.
227 [2021] UKSC 21; [2021] Med LR 523.
228 *Khan*, at para 28; *Manchester Building Society*, at para 6.
229 *Khan*, at para 38; also *Manchester Building Society*, at para 8.

The position is more complex when the scope of the duty is being considered for the purposes of the quantification of damages (ie question 5 above on "the duty nexus"), after applying a simple but-for analysis to ascertain the losses which are in fact in issue.[230] For some time, this issue has been governed by the seminal House of Lords decision of *South Australia Asset Management Corporation v York Montague Ltd* (*SAAMCO*),[231] which drew a distinction between "advice" cases and "information cases" – in "advice" cases, the adviser assumes responsibility for the decision taken and is liable for the foreseeable consequences flowing from that decision, whereas for "information cases", the adviser is only liable for the foreseeable consequences of the information or advice provided being wrong. This distinction has long been criticised for creating some rather arbitrary results.

> The Supreme Court sought to move further away from the rigid distinction between "advice" and "information" cases, which was considered to be unsatisfactory due to the wide spectrum of factual scenarios

Drawing from the more recent Supreme Court decision of *BPE Solicitors and Another v Hughes-Holland*,[232] as well as the previous authorities, Lord Hodge and Lord Sales sought to authoritatively restate the test for the "scope of duty" question in a less prescriptive and more open-textured fashion. In their view, "... the scope of the duty of care assumed by a professional adviser is governed by the purpose of the duty, judged on an objective basis by reference to the reason why the advice is being given (and, as is often the position, including in the present case, paid for)"[233] – in other words, "... one looks to see what risk the duty was supposed to guard against and then looks to see whether the loss suffered represented the fruition of that risk".[234]

The Supreme Court sought to move further away from the rigid distinction between "advice" and "information" cases, which was considered to be unsatisfactory due to the wide spectrum of factual scenarios.[235] Lord Hodge and Lord Sales emphasised again that "... for the purposes of accurate analysis, rather than starting with the distinction between "advice" and "information" cases and trying to shoe-horn a particular case into one or other of these categories, the focus should be on identifying the purpose to be served by the duty of care assumed by the defendant".[236]

As for the proposed counterfactual test in *SAAMCO,* which asks in an "information" case whether the claimant's actions would have resulted in the same loss if the advice given by the defendant had been correct, Lord Hodge and Lord Sales again cautioned against the application of hard-edged rules. In their view, "the counterfactual test may be regarded as a useful cross-check in most cases, but that it should not be regarded as replacing the decision that needs to be made as to the scope of the duty of care", and the analysis ultimately turns on the identification of the purpose of the duty.[237]

Applying the restated test to the facts in *Manchester Building Society*, the court concluded that the purpose of Grant Thornton's duty was to establish whether the building society could use hedge accounting in order to implement its proposed business model within the constraints arising by virtue of the regulatory environment, with the effect that the building society entered into further swap transactions and was exposed to the risk of loss from having to break the swaps, when it was realised that hedge accounting could not in fact be used and they were exposed to regulatory capital demands.[238] The loss being claimed (ie the costs of closing out the swaps) was therefore within the scope of Grant Thornton's duty.

It is clear that the restatement of the test in the *Manchester Building Society* case would have a much wider application in various types of professional negligence cases, including cases involving the negligent advice of construction professionals. One can imagine, for instance, that in a case where an architectural or engineering consultant failed to advise or warn about the dangers or risks of a value-engineered design solution proposed by a contractor, parties would need to grapple with the question of the purpose of the duty and its nexus to the economic losses being claimed.

With the open-textured test now laid down by the Supreme Court, it appears at first sight that it would be much less straightforward to advise parties on the likely conclusion

230 *Manchester Building Society*, at para 12.
231 [1997] 80 BLR 1.
232 [2017] UKSC 21.
233 *Manchester Building Society*, at para 13; also *Khan*, at para 41.
234 *Manchester Building Society*, at para 17.
235 Ibid, at para 18.
236 Ibid, at para 19.
237 Ibid, at paras 23 and 27; also *Khan*, at paras 53, 54 and 63.
238 *Manchester Building Society*, at para 34.

which a court or tribunal would draw, and much would turn on the facts of each case. The position may eventually become clearer with decisions from the TCC which shed light on the practical application of the restated test in a construction and engineering context. Construction professionals and their legal advisers should therefore keep their eyes peeled for future case law in this regard.

Indeed, there have already been some noteworthy TCC decisions in 2021 regarding the scope of a construction professional's duty of care. First, in *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Ltd) (in administration) and Others*,[239] the TCC had to determine (among other things) the preliminary issue of whether an independent design checker (RNP) appointed by a design and build sub-contractor (Bathgate) owed any duty of care to the main contractor (Multiplex), in respect of the failure of a slipform rig certified by RNP which was used in the construction of 100 Bishopsgate.

This case was decided before the Supreme Court's decisions in *Manchester Building Society* and *Khan*. Fraser J observed that the focus was very much on the scope of the duty of care, and "... it should be determined by reference to whether RNP had a duty of care related to the kind of loss which Multiplex has suffered, and which it seeks to recover in these proceedings".[240]

Starting from first principles, Fraser J undertook a comprehensive analysis of the case law regarding the threefold *Caparo* test for the imposition of a duty of care and specifically the assumption of responsibility for pure economic loss.[241] He emphasised that the existence of a contractual framework is a "highly relevant feature", and "... the closer the situation under scrutiny is to a more conventional or habitual business-like relationship governed by contractual terms agreed by the parties, the less likely the law will be to answer the questions concerning assumption of responsibility and fairness, justness and reasonableness, in favour of a claimant such as Multiplex [which] has no contractual relationship with RNP".[242]

Ultimately, Fraser J held that there was in any event no legal reliance because "... Multiplex did not allow the issuing of the certificate to operate upon its mind in such a way that the economic loss that was suffered by it was on account of that reliance", in circumstances where Bathgate produced a variety of documents for the temporary works of which RNP's certificate was only one part (and as a matter of fact, the final certificate was not provided to Multiplex until after the commencement of the temporary works).[243]

Nevertheless, Fraser J observed obiter that RNP did not assume any responsibility towards Multiplex on the facts. In particular, he placed emphasis on the fact that Bathgate had full design responsibility and a direct contractual relationship with Multiplex, whereas there was no direct contract or even contract between RNP and Multiplex, and Multiplex played no part in the selection of RNP, such that not no services were in fact provided by RNP to Multiplex – RNP's responsibility was therefore owed solely to Bathgate.[244] Moreover, "... this is not a situation where the parties have a relationship with all the indicia of a contract, save consideration".[245]

It is noteworthy that Fraser J also took into account the policy considerations of extending RNP's duty of care to Multiplex. In his view, allowing a main contractor to directly sue other entities with whom it had no contractual relations "... will complicate the recovery process enormously"[246] and additionally "... the extra insurance costs that would undoubtedly occur in terms of increased premiums payable by the checker would be formidable".[247]

239 [2021] EWHC 590; [2021] BLR 391.
240 Ibid, at para 116.
241 Ibid, at paras 116 to 164.
242 Ibid, at para 164.
243 Ibid, at paras 167 and 170.
244 Ibid, at para 172.
245 Ibid, at para 173.
246 Ibid, at para 180.
247 Ibid, at para 181.

In many ways, the result in *Multiplex* is unsurprising – the courts have typically been sceptical about attempts to advance a tortious claim against a construction professional (whether for limitation or insolvency reasons) who is not in a direct contractual relationship with the claimant because of the deliberate setup of the chain of involved parties. As Fraser J noted, although a claim against Bathgate (which was in administration) may well lead to challenges on enforcement, "... the law does not determine matters such as justness, and fairness, based on the financial durability of a sub-contractor such as Dunne".[248]

Even if *Multiplex* were to be decided after the Supreme Court's decisions in *Manchester Building Society* and *Khan*, the result is unlikely to change, although the analysis may take on a broader focus on the purpose of the duty owed by RNP. It is likely that the TCC would simply conclude that the purpose of RNP's duty was confined to providing an independent check to Bathgate so that Bathgate could take this into account as part of discharging its wider obligations under the subcontract and/or under health and safety regulations, such that RNP did not purport to provide any advice or information to Multiplex to make any design decisions regarding the temporary works.

In practice, the impact of the Supreme Court's latest decisions would probably be felt most strongly on the quantification of loss (ie the "duty nexus" question), which presupposes that a duty of care is found to be owed to the claimant in the first place. To this end, the TCC has already had the occasion of applying *Khan* and *Manchester Building Society* in *BDW Trading Ltd v URS Corporation Ltd and Another*,[249] where BDW brought professional negligence claims against the structural design consultants (URS and Cameron Taylor) for structural defects at developments in London and Leicester, and the TCC had to consider (among other things) whether losses due to reputational damage fell within the scope of the duty owed.

Fraser J began by noting that *Manchester Building Society* and *Khan* were "... evidently highly important cases on the law of negligence ...", and "... its ratio is applicable to negligence more generally, and not limited to professional advice cases".[250] He then proceeded to analyse the answer to each of the six questions outlined in *Khan* and *Manchester Building Society*.[251]

The discussion regarding the "duty nexus" question is particularly interesting. Fraser J observed that the "duty nexus" question is a "refinement" of the earlier "scope of duty" question, but it "... may well not be required as a separate step in a case, as here, which is not a professional advice case at all. Here, the professional in question designed the structural elements of the building ... However, the duty nexus question still requires addressing, even in a design (rather than a professional advice) case".[252]

> The *BDW* decision is an instructive illustration of how the general principles stated in *Khan* and *Manchester Building Society* will be applied in a construction and engineering context where the negligence complained of relates to the adequacy of a design

Accordingly, addressing the "duty nexus" question separately, Fraser J concluded that "[r]eputational Damage Losses simply cannot be characterised as 'relevant loss'. They do not fall within the measure of damage applicable to the negligence by a structural engineer in the structural design of a building. Mr Hargreaves could produce no authority justifying inclusion of this type of losses in the harm in respect of which a structural designer had a duty of care. I also consider it would be far more than an incremental step to include it".[253]

The *BDW* decision is an instructive illustration of how the general principles stated in *Khan* and *Manchester Building Society* will be applied in a construction and engineering context where the negligence complained of relates to the adequacy of a design. Although there will be different nuances and emphases in each case depending on the facts, parties can expect the courts to assess negligence claims by reference to the six questions outlined by Lord Hodge and Lord Sales, and it will be important in every case to ask what the purpose of the duty is and whether the losses claimed have a sufficient nexus with that particular purpose.

248 Ibid, at para 174.
249 [2021] EWHC 2796 (TCC); (2021) 39 BLM 01 1.
250 Ibid, at para 37.
251 Ibid, at paras 40 to 71.
252 Ibid, at para 59.
253 Ibid, at para 62.

CIVIL PROCEDURE

Witness statements under Practice Direction 57AC

Readers will recall from last year's review that there is now a new Civil Proceudure Rules (CPR) Practice Direction (PD) 57AC and Appendix (Statement of Best Practice) regarding the preparation and contents of witness statements to be adduced in the Business and Property Courts. The gist of the new guidance is that witness statements should be concise[254] and reflect the evidence in chief which a witness would or could give orally,[255] and above all, they should refer to documents (if at all) only where necessary.[256] The courts are at pains to emphasise that witness statements should not contain the following:[257]

(1) Lengthy quotes from any document to which reference is made;
(2) Attempts to argue the case, either generally or on particular points;
(3) A narrative derived from the documents; and/or
(4) Commentary on other evidence in the case.

Shortly after PD 57AC came into force, the court had the occasion to provide guidance on its effect in *Mad Atelier International BV v Manes*[258] (a claim arising from the termination of a joint venture agreement for the international franchise of restaurants under the brand *"L'Atelier de Joel Robuchon"*). Here, the defendant attempted at the pre-trial review to strike-out parts of witness statements on quantum, particularly evidence on comparables of restaurant businesses based on past experience for the purpose of assessing the undervaluation of business and loss of hypothetical profits (which was also subject to expert evidence).

Sir Michael Burton emphasised that PD 57AC is obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements, but it was not intended to affect the issue of admissibility.[259] He considered the previous authorities and considered that admissible factual evidence "... extends, provided that the witness can give evidence by reference to personal knowledge and involvement, to what would or could have happened in the counterfactual or hypothetical circumstances", particularly on quantum.[260] In particular, he cited Jackson J's observations in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd*, which accepted that opinions reasonably related to the facts and comments based on experience can be valuable.[261]

On this basis, the judge concluded that the witness evidence in question did not fall foul of PD 57AC, and indeed, it reflected the instructions to the claimant's independent expert anyway, such that the witness statements made the information more transparent and enabled the underlying basis of the expert evidence to be better tested at trial.[262]

> In particular, in the context of construction disputes, PD 57AC does not preclude evidence of a factual witness' opinion on a technical issue based on his professional experience, and the issue is ultimately one of weight rather than admissibility

Therefore, parties should take care before taking an overly restrictive interpretation of PD 57AC in order to make tactical applications to redact/exclude another party's witness evidence. It is clear that the courts will take a pragmatic approach and intervene only in cases where the evidence clearly trespasses on the province of legal submissions. In particular, in the context of construction disputes, PD 57AC does not preclude evidence of a factual witness' opinion on a technical issue based on his professional experience, and the issue is ultimately one of weight rather than admissibility.

The above approach can similarly be gleaned from the first TCC decision arising from PD 57AC, namely *Mansion Place Ltd v Fox Industrial Services Ltd*.[263] The underlying dispute related to liquidated damages and the waiver of such entitlements, and the parties made cross-applications to redact allegedly non-compliant parts of the other party's witness statements. Citing *Mad Atelier*, O'Farrell J gave the following guidance on the purpose of PD 57AC:

254 Para 3.3 of the Appendix to PD 57AC.
255 Para 2.1 of PD 57AC.
256 Para 3.4 of the Appendix to PD 57AC.
257 Para 3.6 of the Appendix to PD 57AC.
258 [2021] EWHC 1899 (Comm).
259 Ibid, at para 10.
260 Ibid, at para 11(iv).
261 [2008] EWHC 2220 (TCC), at para 671.
262 *Mad Atelier*, at paras 12 and 13.
263 [2021] EWHC 2747 (TCC); (2021) CILL 4609.

> "Anyone involved in producing a witness statement for a trial in the BPC is urged to read PD 57AC and follow the Statement of Best Practice. It should be used as a checklist by parties and their legal representatives to ensure that they do not unwittingly offend against the rules that restrict the use of trial witness statements for their proper purpose, that is, providing in writing the evidence that the witness would give as oral evidence in chief. The stipulation that witnesses must confirm their understanding and compliance with the rules in their statements, and specification of the form of certificate of compliance to be completed by the parties' legal representatives, serve an important function in demonstrating compliance with the restated practice, supported by the court's power to impose sanctions in the event of failure."[264]

Applying PD 57AC to the witness evidence being challenged, O'Farrell J redacted parts of the witness evidence which consisted of (among other things) comments on documents, arguments on legal entitlement, arguments relating to lack of authority, which was not a pleaded issue, and attempts to confirm the veracity of another witness' evidence.[265] However, no redactions were made to impugned paragraphs which summarised the negotiations of the contract sum, the background facts relating to the delays to the project, and the calculations of the liquidated damages.

Parties in ongoing and future TCC proceedings should heed O'Farrell J's warning against the abuse of PD 57AC to make unnecessary and/or costly tactical applications, and she emphasised that the court did not wish to encourage parties to engage in disproportionate satellite litigation, and the trial judge will often be best placed to determine specific issues of admissibility of evidence.[266] As the judge put it, "... serious consideration should be given to finding a more efficient and cost-effective way forward",[267] and a judgment call will have to be made by parties and their legal representatives in each case depending on the nature and extent of the perceived non-compliance.

264 Ibid, at para 38.
265 Ibid, at paras 51 to 65.
266 Ibid, at para 49.
267 Ibid, at para 50.

Expert evidence

Of equal importance to any proceedings is the proper scope of any expert evidence adduced by the parties, and also the discouragement of expert shopping in order to ensure that the expert evidence adduced is genuinely independent and not the product of a process of elimination of successive experts until a favourable opinion can be obtained.

In *Rogerson (t/a Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Ltd*,[268] the TCC was again faced with the familiar question of whether a party should be permitted to change its expert witness, and if so, what terms should be imposed regarding the disclosure of materials relating to the previous expert's advice and/or draft reports.

Deputy High Court Judge Alexander Nissen QC carefully considered the well-known authorities on this issue and noted that "... expert shopping was to be discouraged because it was undesirable".[269] Where there is a procedural vehicle for doing so (for example, where a party is applying for permission to call an expert), the court has the power to impose a condition in respect of the changing of experts even if it means disclosing privileged documents, and this involves "... presenting the party with a choice in which the price to be paid for the leave of the court to rely on Expert B is waiver of privilege in relation to Expert A".[270]

A particular issue which arose was the line to draw where there was no specific pre-action protocol procedure for the early exchange of expert reports (unlike in, for example, personal injury claims). On the facts, the judge proceeded on the assumption that the defendant's expert was instructed with a view to being appointed as the CPR 35 expert, given that litigation was already in prospect, and it would make sense for a party to rely at trial upon the expert who inspected at an early stage in a relatively uncomplicated case such as this when the likely issues were known.[271]

The judge pointed out that the absence of a written report was merely one factor, as there were other notes and preliminary materials which the court could order to be disclosed.[272] Even if the expert was only engaged to provide private pre-litigation advice, the early pre-action engagement between the experts in this case would be sufficient to make this an appropriate case to treat him otherwise.[273]

268 [2021] EWHC 1807; [2021] BLR 519.
269 Ibid, at paras 22 to 32.
270 Ibid, at paras 35 and 36.
271 Ibid, at para 43.
272 Ibid, at para 44.
273 Ibid, at para 45.

In the circumstances of this case, the judge inferred that there was at least the appearance of expert shopping, and that it was an appropriate case to impose the condition of disclosing all attendance notes containing the prior expert's opinions on causation. The judge took into account, for example, the fact that the expert's instructions were not disclosed to show that they were limited as alleged, the initial denial that the expert opined on issues of causation which was later admitted, and the unconvincing reasons given for the need for a new expert.[274]

Therefore, where parties to a dispute engage in pre-action correspondence and exchange information regarding initial expert input on an open basis, this should be done with the expectation that a subsequent change of experts could be conditional upon the disclosure of the initial expert's advice and materials. Moreover, unless there are good reasons for a change of experts (for example, illness or lack of expertise), the court is likely to infer that there is an appearance of expert shopping.

Apart from the issue of expert shopping, an expert's lack of independence and non-compliance with the court's directions can equally give rise to serious problems. In *Dana UK AXLE Ltd v Freudenberg FST GmbH*,[275] the claimant made an application on day seven of the trial to exclude the defendant's technical expert evidence. Joanna Smith J acceded to the application, which was an exceptional course for the court to take.

The result is unsurprising if one considers the litany of non-compliances which the defendant's expert committed, and it is important that there were specific directions in the pre-trial review order for the defendant's expert to explain all materials provided by the defendant and its solicitors, to disclose all documents produced by or provided to each expert during any site visit, and to identify the source and details of the data and other information relied on in support of each proposition or opinion.

First, there was a serious failure to provide full details of all materials provided to the defendant's experts.[276] The judge emphasised that this was "not just a technical or unimportant breach", as "[i]t is essential for the court to understand what information and instructions have been provided to each side's experts, not least so that it can be clear as to whether the experts are operating on the basis of the same information and thus on a level playing field …".[277] It was a matter of transparency and equality of arms, as required by paras 30 to 32 and 55 of the Guidance for the Instruction of Experts in Civil Claims and CPR r.35.9 and r.35.10.[278]

Secondly, the defendant's experts engaged in site visits which were not notified to the claimant, and was provided with materials not disclosed to the claimant.[279] The judge considered that this was again contrary to para 30 of the Guidance for the Instruction of Experts in Civil Claims, as well as para 13.3.2 of the TCC Guide which required experts to cooperate where tests, surveys, investigations, sample gathering or other technical methods of obtaining primary factual evidence are needed.[280]

Thirdly, the defendant's experts failed to identify all the source and details of the data and other information relied on.[281] In particular, there were instances where the expert report gave the misleading impression that there were tests/analyses carried out previously which the expert had seen but had not been disclosed to the claimant, when the expert was in fact simply relying on verbal discussions at meetings with the claimant.[282] The judge described this as "… a paradigm example of what can go wrong if an expert is left to obtain information direct from his clients without legal involvement and, indeed, if that expert does not even require sight of the detailed information on which he then relies for the purposes of preparing his report".[283]

> This is a cautionary tale for all parties to proceedings in the TCC (and also other tribunals) which seek to rely on expert evidence at tria

Finally, the judge emphasised an expert's overriding duty to the court and the well-known principles laid down in *The Ikarian Reefer*[284] and more recently in *Imperial*

274 Ibid, at para 48.
275 [2021] EWHC 1413 (TCC); [2021] BLR 500.
276 Ibid, at para 24 to 47.
277 Ibid, at para 35.
278 Ibid, at paras 36 to 40.
279 Ibid, at paras 43 to 47.
280 Ibid, at para 44.
281 Ibid, at paras 48 to 60.
282 Ibid, at para 54.
283 Ibid, at para 56.
284 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, at para 81.

Chemical Industries Ltd v Merit Merrell Technology Ltd[285] regarding an expert's independence.[286] The breaches discussed above were only the tip of the iceberg, as the judge also criticised the free exchange of information between the experts and the defendant's employees and in-house technical specialists with no (or very little) oversight from solicitors,[287] particularly during the period of joint expert meetings.[288] There was a strong indication that the experts' opinions were directly influenced by the defendant, which casts very serious doubt over his independence and impartiality.[289]

This is a cautionary tale for all parties to proceedings in the TCC (and also other tribunals) which seek to rely on expert evidence at trial. Joanna Smith J stressed in *Dana UK* that "[t]he establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts",[290] and this is advice that parties and their legal representatives need to bear in mind at all times. Otherwise, it is clear that the court will not hesitate to exclude expert evidence which is in serious non-compliance with the CPR in an appropriate case.

Whereas independence of experts is an issue which arises in almost all legal/arbitral proceedings, the issue of conflict of interest is not as common when it comes to the appointment of experts, and it is very much dependent on the existence of express contractual provisions in the retainer to avoid such conflicts. However, this was the question which arose in *Secretariat Consulting PTE Ltd and Others v A Company*.[291]

In this case, a sub-contractor commenced an arbitration against the developer of a large petrochemical plant in relation to delays and loss and expense (Arbitration 1), and the engineering, procurement and construction management (EPCM) consultant subsequently commenced a separate arbitration against the developer for non-payment, with counterclaims by the developer for delay and disruption (Arbitration 2). Secretariat's Singapore branch (SCL) was engaged by the developer in Arbitration 1, whereas Secretariat's London branch (SIUL) was later contacted by the EPCM consultant to act as its delay and quantum experts in Arbitration 2.

Upon learning about SUK's involvement in Arbitration 2, the developer applied to the court for an urgent interim injunction against the Secretariat Group on the grounds of a breach of fiduciary duty and a breach of confidence. This was granted by O'Farrell J in April 2020.[292] On appeal, the Court of Appeal unanimously upheld the TCC's decision.

Coulson LJ considered the relevant authorities on fiduciary duties, confidentiality, and conflicts of interest,[293] and noted that "... there is no English authority on the issue of whether an expert owes a fiduciary duty of loyalty to his client".[294] However, it does not follow that no such duty can exist or that the case should be automatically rejected.[295] Nevertheless, Coulson LJ was reluctant to conclude that there was a fiduciary duty, as it may carry unseen ramifications, and it was not necessary for the disposal of the appeal.[296] The issue was therefore left open to be decided in the future on a case-by-case basis:

> "... Depending on the terms of the retainer, the relationship between a provider of litigation support services/expert, on the one hand, and his or her client on the other, may have one of the characteristics of a fiduciary relationship, namely a duty of loyalty or, to put it another way, a duty to avoid conflicts of interest. That is not contradicted by the expert's obligations to the court. ..."[297]

On the facts of this case, SCL owed an express contractual duty to avoid conflicts of interest,[298] and above all, SCL was giving the undertaking on behalf of all of Secretariat's entities given that all such entities were the subject of the agreed conflict checks – otherwise, carried to its logical conclusion, SCL's argument would theoretically enable SIUL to act for the sub-contractor in Arbitration 1, which was a commercially unrealistic position.[299] It was particularly important, as O'Farrell J noted in the first instance, that Secretariat marketed itself as one global firm with numerous regional offices, rather than a variety of different companies or entities.[300]

Further, Coulson LJ concluded there was clearly an "all-pervasive" overlap and conflict of interest in this case.[301] In reality, SCL would be acting for the developer in Arbitration 1, while SIUL would be acting against the developer's interest in Arbitration 2,[302] and the critical issues in both Arbitrations 1 and 2 concerned delays

285 [2018] EWHC 1577 (TCC); (2018) CILL 4153, at para 237.
286 *Dana UK*, at paras 66 to 69.
287 Ibid, at para 72.
288 Ibid, at para 74.
289 Ibid, at para 82.
290 Ibid, at para 93.
291 [2021] EWCA Civ 6; [2021] BLR 167.
292 [2020] EWHC 809 (TCC); (2020) 37 BLM 05 9.
293 *Secretariat Consulting*, at paras 35 to 53.
294 Ibid, at para 34.
295 Ibid, at para 59.
296 Ibid, at para 65.
297 Ibid, at para 66.
298 Ibid, at paras 68 to 72.
299 Ibid, at paras 73 to 81.
300 Ibid, at para 75.
301 Ibid, at paras 87 and 92.
302 Ibid, at para 88.

in design and construction.[303] It was impossible to see how the same firm could act for the developer and simultaneously against its representative/agent/alter ego in respect of the same or similar disputes on the same project.[304]

One cannot help but wonder whether the same result would have been reached if the retainer/contract did not contain any express provisions as to confidentiality or conflicts of interest. Coulson LJ was visibly reluctant to conclude that there was a fiduciary duty. Males LJ even went so far as to say that "[s]ave perhaps in circumstances far removed from the present case, an expert witness is not a fiduciary and does not owe fiduciary duties to his client", although he left open the possible contractual position (perhaps by way of an implied term) if a contract did not expressly deal with conflicts of interest.[305]

> A convenient rule of thumb is to ask whether an existing client would raise an objection – indeed, if an objection has been raised (as in *Secretariat Consulting*), it would be unwise to seek to ignore or circumvent that objection and continue acting in potentially conflicting capacities

Parties and their legal representatives should therefore take care to include express terms on conflicts of interest and confidentiality, in order to avoid the need to have to establish such duties at common law. More generally, international firms which provide expert witness services should be mindful of creating conflicts by acting for different parties in the same project in different regional offices. A convenient rule of thumb is to ask whether an existing client would raise an objection – indeed, if an objection has been raised (as in *Secretariat Consulting*), it would be unwise to seek to ignore or circumvent that objection and continue acting in potentially conflicting capacities.

303 Ibid, at para 91.
304 Ibid, at para 89.
305 Ibid, at paras 104 and 105.

Amendment of pleadings post-limitation

Practitioners who are experienced in construction disputes will be very familiar with the scenario where new defects or breaches come to light after the particulars of claim have been issued and after independent expert investigations (particularly intrusive inspections) are carried out as part of the preparation of expert evidence for trial. Where proceedings are issued just before the expiry of limitation, the question often arises as to whether the new defects amount to new claims, and if so, whether such claims can be added by way of the reply and/or amendments to the particulars of claim.

Martlet Homes Ltd v Mulalley & Co Ltd[306] concerned a claim for the "waking watch" costs and costs of replacing a cladding system due to fire safety defects in the fire barriers, insulation boards and substrate of the external walls. In this case, Mulalley sought to strike out part of the reply which pleaded new breaches in respect of the combustible expanded polystyrene (EPS) insulation, and Martlet cross-applied for permission to amend its particulars of claim to add these new breaches. The reply was pleaded in this manner because Mulalley's defence argued that as a matter of causation, the replacement of the cladding was due to the combustibility of the EPS insulation and the owner's duty under the Regulatory Reform (Fire Safety) Order 2005.

On the strike-out application, Pepperall J was firmly of the view that "the terms of r 16.4(1)(a), the optional nature of the Reply, the rule restricting subsequent statements of case and the terms of the Practice Direction all point to the clear conclusion that any ground of claim must be pleaded in the Particulars of Claim".[307] In his view, such an approach was "... inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost", as a claimant would always have a second bite at the cherry in its reply, and the defendant would require permission to answer by way of a rejoinder.[308]

However, Pepperall J went on to grant permission to Martlet to amend the particulars of claim, despite the expiry of limitation (which was common ground). The judge was satisfied that despite the absence of amendments to the loss and damage claimed, the proposed amendment to plead a breach of contract due to the use of combustible EPS insulation was plainly a new cause of action.[309] Nevertheless, he concluded

306 [2021] EWHC 296 (TCC); [2021] BLR 307.
307 Ibid, at para 20.
308 Ibid, at para 21.
309 Ibid, at para 34.

that the new claim arose from substantially the same facts, given that the proposed amendments arose from matters which were asserted in the defence, and there was no basis for the court to exclude the defence when considering what facts were already in issue.[310] This was further reinforced by the judge's view that there was no real prejudice to the defendant.[311]

Pepperall J's decision has now been upheld by a unanimous Court of Appeal.[312] Importantly, Coulson LJ was firmly of the view that the additional claim regarding the selection of combustible insulation flowed naturally from the way in which Mulalley had pleaded its defence, and that investigations into that issue would have been required in any event.[313] Going forward, prospective defendants will need to be very careful about the way their defence is pleaded, in order to avoid unwittingly giving the claimants an opportunity to expand the scope of their causes of action. It will be interesting to see how the latest guidance will be applied in future cases, especially in cladding disputes where limitation issues often arise.

Representative proceedings

Having touched on claims arising from the Grenfell Tower tragedy in the section above, another topical issue is the purpose and scope of representative proceedings under CPR r 19.6, which has particular relevance in recent times to cladding claims being brought by certain building owners, leaseholders and/or management companies in a representative capacity.

It was therefore particularly interesting to see the Court of Appeal's decision in *Jalla and Another v Shell International Trading and Shipping Co Ltd and Another*,[314] which was a claim for remediation relief arising out of one of the largest oil spills in history in Nigeria and the damage caused to the local community. The claimants issued these proceedings on behalf of more than 28,000 affected individuals and communities in Nigeria, just before the expiry of limitation in December 2017. The proceedings have had a chequered history, with various applications and appeals which have given rise to a number of reported decisions.

In this latest instalment in the saga, the defendant (Shell) sought to strike out the representative element of the claim and succeeded in doing so in the TCC.[315] On appeal, the Court of Appeal agreed that the claims being advanced could not be pursued as representative proceedings.

Coulson LJ began by noting the particular requirements and limitations of representative proceedings, especially (among other things) the need for the same interest in a claim for all practical purposes, taking into account any limitation defence and the nature of any other likely defences.[316] He emphasised that the primary purpose of representative proceedings is to save time and costs, such that the requirement of the same interest in a claim is critical and requires careful evaluation:[317]

> "So, if the claims made by the representatives are successful, then so too are the claims of the represented parties. Conversely, if the claims made by the representatives fail, then so do the claims of the represented parties. The court only tries the claims of the representatives; it does not consider the individual claims of the represented parties. The whole point of a representative action is that it avoids such granularity; otherwise its principal benefit is lost."[318]

With the above in mind, Coulson LJ was of the clear view that a representative action could not be achieved and would not save time and costs, and issues such as limitation, causation and the damage justification of the remedial scheme claimed for would have to be individually addressed case by case, on a proposed "rolling basis" which would involve each of the 28,000 plus claimants taking turns.[319] This was considered to be antithetical to the purpose of CPR r 19.6.

The claimants argued in the first place that this case was indistinguishable from the Court of Appeal's earlier decision in *Lloyd v Google*,[320] which was a claim brought on behalf of more than four million iPhone users for damage suffered due to the tracking and use by Google of browser-generated information without the users' consent. However, Coulson LJ had little difficulty rejecting this argument, on the basis that in this case, there were different causes of action being advanced by each party (for example, nuisance, negligence and the like),[321] each of which had to prove the actual damage and the

310 Ibid, at paras 35 to 47.
311 Ibid, at para 51.
312 *Mullaley & Co Ltd v Martlet Homes Ltd* [2022] EWCA Civ 32.
313 Ibid, at para 90.
314 [2021] EWCA Civ 1389; [2021] BLR 743.
315 [2020] EWHC 2211 (TCC).
316 *Jalla*, at para 51.
317 Ibid, at paras 52 and 53.
318 Ibid, at para 54.
319 Ibid, at paras 57 to 65.
320 [2019] EWCA Civ 1599.
321 Ibid, at paras 77 to 79.

justification for the remediation relief claimed,[322] and with different issues as to limitation[323] and alternative causes of pollution,[324] which must again be considered for each individual claim.

For similar reasons, Coulson LJ concluded that the community of claimants could not establish the same interest in the claim. In reality, even though the background of the proceedings was the oil spill, the claims related to what happened after the oil reached the shores, and each claimant's individual interest in the claim for remediation relief was plainly not the same, with different parcels of land being remedied (which required consideration of the specific damage suffered) and also various different defences in play.[325] Ultimately, "... the possibility of mixed success ... demonstrates why these proceedings are incapable of comprising a representative action".[326]

The *Jalla* decision is a helpful illustration of when representative actions can and should be brought. The focus of the court will be on the existence of a same interest in the claim, which effectively means that the court can dispose of all claims on the same representative basis, without having to consider a multiplicity of causes of action, defences, issues of causation and quantum for each and every individual claimant. This threshold question must be considered carefully before parties are advised to commence any representative proceedings under CPR r 19.6 – especially if there are limitation issues which may prevent a claimant from later commencing proceedings in a personal capacity if the representative action falls through.

322 Ibid, at paras 80 to 83.
323 Ibid, at paras 84 to 87.
324 Ibid, at paras 88 to 90.
325 Ibid, at paras 99 to 107.
326 Ibid, at para 108.

GLOBAL PERSPECTIVES

Hong Kong SAR, China

Hong Kong SAR (HKSAR) continues to be one of the leading centres for domestic and international arbitration, with the Hong Kong International Arbitration Centre (HKIAC) being one of the five most preferred arbitral institutions.[327] The past year has seen a number of interesting arbitration-related developments as well as some instructive case law on the interpretation of arbitration clauses.

First, on 19 May 2021, the Arbitration (Amendment) Ordinance 2021 came into force, in order to give effect to the outstanding parts of the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between Mainland China and HKSAR dated 27 November 2020 (which was covered in last year's annual review). The latest amendments are twofold: (i) all arbitral awards made in the Mainland will be enforceable in HKSAR, and not just those made by certain recognised Mainland arbitral authorities; and (ii) a party which has a Mainland arbitration award will be able to simultaneously enforce that award in both HKSAR and the Mainland. As noted previously, these are welcome developments which will facilitate cross-border enforcement of arbitral awards, and parties will have greater flexibility in choosing the seat of the arbitration in disputes involving parties based in both the Mainland and HKSAR.

Further, on 29 November 2021, the Asian-African Legal Consultative Organization (AALCO) announced the establishment of a regional arbitration centre in HKSAR, in order to promote international commercial arbitration in Asia and Africa, coordinate and assist the activities of existing arbitral institutions, and assist in the enforcement of arbitral awards. This is the sixth regional arbitration centre established by AALCO in the Asia Pacific and MENA regions. This is yet another positive development to cement the role of Hong Kong as a continuing arbitration hub in the region, with an ever-increasing emphasis on arbitrations relating to cross-border transactions, whether construction/infrastructure-related or otherwise.

In terms of arbitration-related case law, two recent decisions of the Hong Kong Court of First Instance arising from applications to stay legal proceedings in favour of arbitration are worth mentioning.

327 White & Case LLP, "2021 International Arbitration Survey".

First, in *Houtai Investment Holdings Ltd v Leung Yat Tung and Others*,[328] Houtai and CAE entered into a written sub-subcontract for works relating to the relating to the "Tuen Mun – Chek Lap Kok Link – Northern Connection Sub-sea Tunnel Section" project. For the purpose of those sub-subcontract works, Houtai alleged that certain vessels were leased to CAE under oral agreements. The written sub-subcontract (and also the subcontract upstream) contained express arbitration provisions, and the question was whether disputes in respect of the alleged oral leases (and also alleged conversion/detinue) fell within the scope of those provisions.

The wording of the arbitration provisions was very broad. Clause 22.2 of the Articles of Agreement provided that "[i]f any dispute cannot be settled by agreement (or otherwise) then it will be referred to arbitration …", and clause 22.6 allowed any dispute under the sub-subcontract to be referred to the same arbitrator if it is related to a dispute under the subcontract.

Mimmie Chan J considered that the test or consideration was therefore whether the disputes which had arisen were both under the subcontract and under the sub-subcontract, and were related.[329] She emphasised that "[t]he modern approach to the construction of arbitration agreements is the presumption in favour of arbitrability and the 'one-stop' adjudication approach",[330] and moreover:

> "In any event, I do not agree that it would be useful to rely on decisions as to the meaning which the courts have attached to the use of 'under', 'in connection with' or 'in relation to' in arbitration agreements, and whether and how one is wider in scope than the other. The scope of an arbitration clause is to be construed and interpreted in the context of the agreement made by the parties in each particular case, and the exercise of construction is one of ascertaining objectively the intention of the parties at the time when the agreement was made. …"[331]

On the facts, Houtai and CAE had a wider legal relationship under the sub-subcontract which was the stated purpose for which the vessels were leased, and indeed, the vessel rental charges were continuously invoiced under and by reference to the sub-subcontract.[332] The oral agreements did not specify any other dispute resolution procedure,[333] and clause 22 was sufficiently broad to embrace all disputes which may have arisen between Houtai and CAE in the course of dealings under or related to the sub-subcontract.[334]

In all the circumstances, the judge concluded that it would not be reasonable for the parties as rational businessmen to have intended that disputes arising under the oral leases and those under the sub-subcontract should be resolved in different fora, and a stay for arbitration was therefore granted.[335] This decision is wholly consistent with the modern approach to interpreting arbitration provisions and the presumption in favour of a "one-stop shop" for dispute resolution, which can also be found in the English authorities (as specifically cited by Mimmie Chan J in *Houtai Investment*).

> In particular, an arbitration clause would not be construed as giving a choice to the parties between arbitration and litigation, unless there was very clear language to that effect, yet there was no mention at all of the option to litigate in this clause

The second case of interest is *Kinli Civil Engineering Ltd v Geotech Engineering Ltd*,[336] which concerned disputes arising from a subcontract for site formation, drainage and pile cap works in relation to a public housing development project at Shek Kip Mei Estate Phase 6 in Hong Kong. The arbitration clause was written in Chinese and provided that if any disputes arose between Geotech and Kinli on any question and the parties are unable to reach agreement, "… both parties may submit the dispute or controversy to the relevant arbitral institution for resolution …".

On Kinli's application for a stay for arbitration, Geotech contended that the clause was merely permissive as it used the word "may". As in *Houtai Investment*, Mimmie

328 Unreported, HCA 1725/2019 (Court of First Instance, 27 May 2021).
329 Ibid, at para 18.
330 Ibid, at para 20.
331 Ibid, at para 19.
332 Ibid, at paras 22 and 25.
333 Ibid, at para 23.
334 Ibid, at para 26.
335 Ibid, at paras 33 and 34.
336 [2021] 6 HKC 524.

Chan J began by reiterating that "... an arbitration agreement can be held to exist so long as the intention to arbitrate is sufficiently clear", and "[t]he modern approach to the construction of arbitration agreements is the presumption in favour of arbitrability and the "one-stop" adjudication approach".[337]

In the context of the subcontract in question, the judge considered that it would be unusual for the parties to establish separate and distinct procedures for resolving what were likely to be different aspects of the same dispute.[338] In particular, an arbitration clause would not be construed as giving a choice to the parties between arbitration and litigation, unless there was very clear language to that effect,[339] yet there was no mention at all of the option to litigate in this clause.[340]

Accordingly, reading the clause as a whole, there was a prima facie case for arguing that notwithstanding the use of "may" in the clause, the parties were bound to arbitrate such disputes if either party elects for arbitration. Even if it was open to one party to the contract to commence litigation, the clause gave the other party the option of requiring the party which had commenced the litigation to submit the dispute to arbitration, by making an unequivocal request to that effect and/or by applying for a stay of the litigation.[341] The stay application was therefore granted, and it is abundantly clear that the Hong Kong SAR courts are keen to maintain a pro-arbitration approach and striving to uphold express arbitration agreements if at all possible.

Aside from arbitration, it appears that the push for construction adjudications may well be gaining momentum in Hong Kong. A survey conducted in 2011 by the Development Bureau and Construction Industry Council revealed significant payment problems in the construction industry, and a public consultation was carried out in 2015 in this regard.

On 5 October 2021, the Hong Kong SAR government's Development Bureau issued a new Technical Circular (Works) No 6/2021, which contains a security for payment framework for prospective legislation and prescribes the mandatory incorporation of security of payment and adjudication provisions into all public works contracts at all tiers. Akin to the framework of the HGCRA in the UK, the circular provides for a regime of payment notices and payment deadlines, prohibits "pay when paid" and "pay if paid" provisions, and allows payment disputes to be referred to adjudication, including claims for time-related costs (with a decision to be made within 55 working days from the date of the adjudicator's appointment).

The circular expressly states at paragraph 6 that it "promulgates the implementation of the spirit of the SOPL in all new public works contracts with a view to facilitating smooth introduction of the legislation through the experience gained in public works contracts". The industry should therefore watch this space, as there are likely to be further developments in the days ahead in terms of the drafting of the security for payment bill. Meanwhile, the construction industry in Hong Kong SAR will be having a sneak preview of the operation of a security for payment and adjudication regime, and there is likely to be ample room for legal practitioners in the UK to share their experiences under the HGCRA with parties in Hong Kong which are adjudicating for the first time.

Singapore

The popularity of Singapore as a seat of arbitration has long been cemented by the pro-arbitration approach of the Singapore Courts and the robustness of the Singapore International Arbitration Centre (SIAC). In the "2021 International Arbitration Survey" published by White & Case LLP (in partnership with Queen Mary, University of London),[342] Singapore shared the top spot with London, with 54 per cent of the respondents identifying it as one of the five most preferred seats of international arbitration. In particular, the SIAC was found to be the second most popular arbitral institutions after the ICC, with 49 per cent popularity globally.

In tandem with the height of Singapore's popularity as a seat of arbitration, a recent and widely-discussed example of the Singapore Courts' pro-arbitration approach can be found in *Republic of India v Vedanta Resources plc*,[343] where a party sought (among other things) declaratory relief from the court to address certain questions of law already decided by an arbitral tribunal, in an attempt to persuade the tribunal to reconsider the orders made relating to cross-disclosure of documents between two separate but related arbitrations (and its implications in terms of obligations of confidentiality).

337 Ibid, at para 23.
338 Ibid, at para 24.
339 Ibid, at para 27.
340 Ibid, at para 29.
341 Ibid, at para 22.

342 White & Case LLP and Queen Mary, University of London, "2021 International Arbitration Survey: Adapting arbitration to a changing world" (6 May 2021).
343 [2021] SGCA 50.

The Singapore Court of Appeal refused to make any such declaratory relief. Steven Chong JCA considered that "the application was either a backdoor appeal against the VPOs, or an attempt to seek an advisory opinion from the court in order to put pressure on the Vedanta Tribunal … both purposes were equally improper".[344] The declarations would effectively overrule the tribunal's decisions in its procedural orders,[345] and "[t]his was vexatious because it amounted to a relitigation of the issues that had been placed before the Vedanta Tribunal".[346] In the court's view, this would be an abuse of process and a blatant violation of the principle of minimal curial intervention:

> "The principle of minimal curial intervention is an essential feature of Singapore's lex arbitri, and is enshrined in Article 5 of the Model Law. It 'dictates that courts should not without good reason interfere with the arbitral process', and should act with a view to 'respecting and preserving the autonomy of the arbitral process' …"[347]

The *Republic of India* decision is therefore the clearest and latest confirmation of the robust approach of the Singapore courts towards protecting the integrity of the arbitration process and preventing sham proceedings which are practically seeking a second bite at the cherry after an arbitral award. This should give parties (in construction/infrastructure disputes or otherwise) continuing confidence in the conduct of arbitral proceedings in Singapore and the strict boundaries of the Singapore courts' supervisory jurisdiction.

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In addition to the arbitration scene, readers are no doubt aware of the Singapore International Commercial Court (SICC) which was established back in 2015. Parties anywhere in the world can expressly opt for the SICC as the exclusive forum for resolving their disputes, and this was designed to meet the growing demand for effective transnational dispute resolution through litigation due to Singapore's strategic location in Asia-Pacific. The SICC consists of a panel of experienced international and local commercial judges, and foreign lawyers can represent parties if they are registered with the SICC and adhere to an ethical code.

On 2 December 2021, the new SICC Rules 2021 were gazetted and will formally come into force on 1 April 2022. The objective of the new SICC Rules is to simplify some of the definitions and rules, modernise the language, streamline procedural steps, increase procedural flexibility, and enable greater judicial control of the entire litigation process. Key changes include the express requirement to consider ADR and inform the SICC of its feasibility, and the requirement to seek permission to adduce any expert evidence and prepare an agreed set of assumed facts for experts to rely on. Ultimately, the SICC seeks to maintain robust case management in all its proceedings, in order to prevent dilatory practices and delays and to control overall costs.

SICC president Quentin Loh J has observed that robust case management under the SICC Rules "… sets it apart from international dispute resolutions where adjudicators are reluctant to deal firmly with dilatory tactics, as they are concerned that their awards may be subsequently set aside for lack of a fair hearing in what the legal profession terms 'due process paranoia'".[348]

Parties and their legal advisers should certainly take this into account when considering SICC as an option during the drafting of dispute resolution provisions in future contracts with a cross-border element. Indeed, thinking ahead about prospective disputes and the procedural rules to opt for, there may well be strategic advantages in having a more robust procedure akin to that of the courts, so that the scope and admissibility of evidence can be more tightly controlled. This can be particularly important where disputes are likely to be complex because of technical issues such as delay and defects in construction projects. In any event, it is likely that more and more parties will look to the SICC and the SIAC as their preferred fora for resolving cross-border disputes.

344 Ibid, at para 35.
345 Ibid, at para 38.
346 Ibid, at para 56.
347 Ibid, at para 47.

348 See the SICC's media release at www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-singapore-international-commercial-court-introduces-standalone-sicc-rules-2021-to-incorporate-international-best-practices-and-facilitate-international-dispute-resolution.

Middle East

Turning to the Middle East, Dubai has no doubt continued to be a growing arbitration hub in the region. However, there were two rather significant developments in 2021 which can give rise to potential complications for parties in ongoing and future arbitrations in Dubai.

On 20 September 2021, Dubai Decree No 34 of 2021 came into force, which abolished the Emirates Maritime Arbitration Centre and the Dubai International Financial Centre's Arbitration Institute (commonly known as the DIFC-LCIA). All assets, funds, rights, obligations, and arbitrators' lists of the abolished institutions were transferred to the Dubai International Arbitration Centre (DIAC), which has become a single unified arbitration forum in Dubai and the DIFC.

This development sent shockwaves around the arbitration community in the region and worldwide, as it was an unexpected and drastic move. The Decree provides that previous arbitration agreements based on the abolished institutions remain valid and effective, as DIAC will take the place of the abolished institutions and continue to administer arbitrations arising under such agreements, and existing arbitral tribunals appointed by the abolished institutions will continue to determine the disputes as before (unless the parties agree otherwise). However, there remain various question marks about the potential implications of this sea change.

For instance, uncertainties remain about how well DIAC is equipped to take on the role and responsibilities of the abolished institutions, and there is also a real risk of complications regarding the validity and enforceability of arbitral awards issued in accordance with the DIFC-LCIA rules, especially if the seat of the arbitration is outside Dubai. There is also the more fundamental objection that the Decree effectively rewrites and undermines the parties' prior consent to the abolished arbitration centres and their rules, which goes to the very root of each arbitration agreement.

As the DIFC-LCIA is in ongoing consultation with the DIAC and the Dubai government regarding the implementation of the decree, parties and their legal advisers should pay close attention to any further developments in this regard. In the meantime, parties in ongoing DIFC-LCIA arbitrations and parties to contracts containing DIFC-LCIA arbitration clauses will need to consider whether their agreements need to be renegotiated and varied, and/or whether they should adopt the DIAC rules instead for the remainder of the ongoing arbitral proceedings.

The second development specifically relates to the upholding of arbitration agreements in the Dubai Courts. In the recent Dubai Court of Cassation judgment No 290/2021, a developer commenced proceedings in the Dubai Court of First Instance against a building contractor and a consultant who provided supervisory, design and engineering services, claiming damages for allegedly incomplete works which have been wrongly certified. The contract with the consultant contained an arbitration clause, but the contract with the contractor did not.

> It is noteworthy that the Court of Cassation emphasised the exceptional nature of arbitration agreements (as the courts are still regarded as having original jurisdiction and competence as a default position), such that arbitration agreements are construed narrowly and strictly

The Court of Cassation upheld the lower courts' decisions and concluded that it was in the interest of justice to require the consultant to submit to the court's jurisdiction. The disputes were so closely connected that they should not be determined separately, and in order to avoid inconsistent judgments, the court considered that the disputes should be adjudicated by one forum. In this case, as the arbitration agreement was only binding on the consultant, it was not possible for the whole dispute to be determined by arbitration, and so the appropriate forum was the Dubai courts.

It is noteworthy that the Court of Cassation emphasised the exceptional nature of arbitration agreements (as the courts are still regarded as having original jurisdiction and competence as a default position), such that arbitration agreements are construed narrowly and strictly. The result in this case can probably be explained by the specific set of facts, given that the consultant's liability ultimately depended on the contractor's primary liability which was not subject to any arbitration agreement. That being said, such multi-partite claims are very common in the construction, infrastructure and energy sectors, and this decision potentially carves a significant inroad into parties' autonomy to opt for the confidentiality and privacy of arbitrations.

One cannot help but wonder whether a court in England and Wales, Singapore or Hong Kong SAR would reach the same conclusion, or if it would simply be a case of staying the claim against the consultant for arbitration so as to avoid doing too much violence to the parties' express agreement. On any view, it is important for parties operating in Dubai to ensure that related contracts in the same construction, infrastructure or energy project contain similarly drafted and mutually consistent arbitration provisions, so as not to end up in the situation discussed above.

Meanwhile, the International Court of Arbitration of the ICC and the Abu Dhabi Global Market (ADGM) officially opened a new case management office in Abu Dhabi, and the existing activities of the ICC's MENA representative office will be incorporated into the new case management office. The ADGM Arbitration Centre will also make its facilities available for ICC arbitrations. Given the popularity of ICC arbitrations with parties based in the UAE, and in light of the recent developments in Dubai, it will be interesting to see whether there will be a shift in the arbitration landscape towards Abu Dhabi in the coming months and years.

CONCLUDING OBSERVATIONS

It should be self-evident from the preceding discussions that 2021 has been a legally significant year both here in the UK and abroad, and it has given all stakeholders and legal practitioners in the construction, infrastructure and energy industry much food for thought. In many instances, the industry now has the benefit of clear judicial guidance on important day-to-day issues, whereas in some other cases, there will be lingering questions which will have to be answered in future decisions.

The dynamic contours of commercial law and construction law are corollaries of the organic nature of English common law. In many ways, this is what prevents the stagnation of the law in an evolving world. As Lord Leggatt remarked during a recent lecture:

> "... One of the great advantages of the common law is that it has been developed from the ground up, from the experience of actual cases, so that it generally reflects norms and usages of commerce. It also has the capacity to adapt as such norms and usages evolve."[349]

In spite of all the uncertainty caused by the ongoing Covid-19 pandemic, we can expect the body of case law to continue to grow healthily in 2022 (and indeed all the years to follow), providing more answers to the legal questions of the day. As far as the construction industry is concerned, there are already a number of judgments in the pipeline which will be of wider interest.

> The dynamic contours of commercial law and construction law are corollaries of the organic nature of English common law

As mentioned above, the Court of Appeal has now handed down its decision in *Martlet Homes Ltd v Mulalley & Co Ltd*,[350] which provides helpful clarification on the addition of new claims after the expiry of limitation in response to issues pleaded in a defence. Further, the TCC will also be expected to hand down its judgment in the Part 8 proceedings of *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd*[351] (where this author acted for the claimant), which will consider the extent to which decisions on variations and extensions of time made in an adjudication around the time of practical completion would remain binding for the purposes of the final account assessment and any subsequent adjudications.

At the same time, the Grenfell Tower Inquiry being chaired by Sir Martin Moore-Bick is still ongoing. The inquiry heard the evidence of the firefighters and the National House Building Council just before Christmas 2021, and it will carry on hearing evidence on testing and government regulation in the coming months. Meanwhile, the government published the Building Safety Bill back in July 2021, which is currently in the report stage.[352]

The Building Safety Bill introduces a number of significant legislative changes in response to the Grenfell Tower tragedy, including the establishment of a new building safety regulator to oversee the regulatory regime, the creation of the role of "accountable person" to assess the safety of high-risk buildings and appoint a building safety manager, and a requirement on building owners to explore alternative ways of funding remedial works before seeking contributions from leaseholders.

In respect of more immediate issues arising from existing defective cladding works and necessary remedial works, the Building Safety Bill proposes to amend the Defective Premises Act 1972 to extend the limitation period for homeowners' claims regarding unfitness for habitation. If enacted, the current limitation of six years from completion would be extended to 15 years. This will open the doors for many more claims, as limitation is proving to be a significant hurdle for many potential claimants as the law currently stands (especially where it is difficult to establish a tortious claim). This is also intimately linked to the Building Safety Fund regime, as parties which receive funding are typically expected to use their best endeavours to continue pursuing the remedial costs from the responsible parties. The industry will no doubt watch the progress of the bill closely over the next 12 months, as it proceeds to the House of Lords for further readings.

349 Lord Leggatt, "What is the point of commercial law?", The Fourth Jonathan Hirst Commercial Law Lecture, 2 November 2021), at para 57.
350 [2022] EWCA Civ 32.
351 Claim no HT-2021-000388.
352 See https://bills.parliament.uk/bills/3021.

Finally, readers will recall from the annual reviews of previous years that the construction industry has long been pushing for legislative reform regarding the retention of payments, following the catastrophic collapse of the Carillion group in 2018. Since the introduction of the "Aldous Bill" in March 2019 and the publication of the consultation responses in February 2020, the proposals have been put on the backburner, in part due to the pressures of Brexit followed by the disruption caused by Covid-19.

> There is no room for complacency in terms of the way the industry engages in commerce and resolves everyday disputes, and we are all constantly pushed to adapt and evolve

In January 2021, however, Lord Aberdare asked the government for an update on its intentions during a debate in the House of Lords,[353] and in October 2021, he introduced the Construction (Retentions Abolition) Bill as a private member's bill.[354] This is an ambitious proposal to amend the HGCRA so as to render all contractual retention provisions unenforceable by 25 January 2025, and any outstanding retention sums by that date shall be repaid within seven days. As there is as yet no consensus within the industry and no clear support from the government, it is doubtful that this bill will be successfully enacted. Nevertheless, it would be interesting to see the parliamentary debates which the bill will generate, as it is currently in its second reading, and it will hopefully provide renewed impetus for the consideration of much-needed reform in this area.

As we take stock of all the highs and lows of the previous year, the construction industry will have to soldier on in the next 12 months, as it grapples with the continuing hurdles posed by Covid-19 and Brexit. In this context, keeping pace with legislative changes and key case law developments has taken on an ever-increasing significance, in order for parties and their legal advisers to properly assess and manage the risks and costs. At the same time, there is no room for complacency in terms of the way the industry engages in commerce and resolves everyday disputes, and we are all constantly pushed to adapt and evolve. Will we continue to rise to the challenge in 2022? This author is optimistic that next year's annual review will be able to answer this question with a resounding "yes".

[353] See https://hansard.parliament.uk/lords/2021-01-14/debates/9AA5A702-C104-4C50-9DC8-1EED67E83A95/ConstructionIndustryRetentionPayments.

[354] See https://bills.parliament.uk/bills/3056.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2021 judgments analysed

Balfour Beatty Regional Construction Ltd v Van Elle Ltd [2021] EWHC 794 (TCC); (2021) 38 BLM 05 11

Barhale Ltd v SP Transmission plc [2021] CSOH 2

BDW Trading Ltd v URS Corporation Ltd and Another [2021] EWHC 2796 (TCC); (2021) 39 BLM 01 1

CC Construction Ltd v Mincione [2021] EWHC 2502 (TCC); [2022] BLR 48

Croda Europe Ltd v Optimus Services Ltd [2021] EWHC 332 (TCC)

Dana UK AXLE Ltd v Freudenberg FST GmbH [2021] EWHC 1413 (TCC); [2021] BLR 500

Davies & Davies Associates Ltd v Steve Ward Services (UK) Ltd [2021] EWHC 1337 (TCC); [2021] BLR 542

Delta Fabrication & Glazing Ltd v Watkin Jones & Son Ltd [2021] EWHC 1034 (TCC); (2021) CILL 4521

Downs Road Development LLP v Laxmanbhai Construction (UK) Ltd [2021] EWHC 2441 (TCC); [2022] BLR 72

Dubai Court of Cassation judgment No 290/2021

Dwyer (UK Franchising) Ltd v Fredbar Ltd and Another [2021] EWHC 1218 (Ch)

Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC); [2021] BLR 687

Fraserburgh Harbour Commissioners, The v McLaughlin & Harvey Ltd [2021] CSOH 8

Global Switch Estates 1 Ltd v Sudlows Ltd [2020] EWHC 3314 (TCC); [2021] BLR 111

Greater Glasgow Health Board v Multiplex Construction Europe Ltd and Others [2021] CSOH 115

Hochtief Solutions AG and Others v Maspero Elevatori SpA [2020] ScotCS CSOH 102

Houtai Investment Holdings Ltd v Leung Yat Tung and Others Unreported, HCA 1725/2019 (Court of First Instance, 27 May 2021)

Jalla and Another v Shell International Trading and Shipping Co Ltd and Another [2021] EWCA Civ 1389; [2021] BLR 743

John Doyle Construction Ltd v Erith Contractors Ltd [2021] EWCA Civ 1452; [2021] BLR 717

Khan v Meadows [2021] UKSC 21; [2021] Med LR 523

Kinli Civil Engineering Ltd v Geotech Engineering Ltd [2021] 6 HKC 524

Lewisham Homes Ltd v Breyer Group plc [2021] EWHC 1290 (TCC)

Mad Atelier International BV v Manes [2021] EWHC 1899 (Comm)

Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20; (2021) 38 BLM 07 1

Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2747 (TCC); (2021) CILL 4609

Martlet Homes Ltd v Mulalley & Co Ltd [2021] EWHC 296 (TCC); [2021] BLR 307

Motacus Constructions Ltd v Paolo Castelli SpA [2021] EWHC 356 (TCC); [2021] BLR 293

Mott MacDonald Ltd v Trant Engineering Ltd [2021] EWHC 754 (TCC); [2021] BLR 440

Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd and Others [2021] EWHC 590; [2021] BLR 391

Pakistan International Airline Corp v Times Travel (UK) Ltd [2021] UKSC 40; (2021) 38 BLM 09 1; [2021] 2 Lloyd's Rep 234

Prater Ltd v John Sisk and Son (Holdings) Ltd [2021] EWHC 1113 (TCC); [2021] BLR 474

Quadro Services Ltd v FP McCann Ltd [2021] EWHC 1490 (TCC)

Republic of India v Vedanta Resources plc [2021] SGCA 50

Rogerson (t/a Cottesmore Hotel, Golf and Country Club) v Eco Top Heat & Power Ltd [2021] EWHC 1807; [2021] BLR 519

Rudolph v United Airlines Holdings Inc 519 F Supp 3d 438 (ND Ill 2021)

Secretariat Consulting PTE Ltd and Others v A Company [2021] EWCA Civ 6; [2021] BLR 167

Septo Trading Inc v Tintrade Ltd [2021] EWCA Civ 718

Toppan Holdings Ltd and Another v Simply Construct (UK) LLP [2021] EWHC 2110 (TCC); [2021] BLR 705

Transport For Greater Manchester v Kier Construction Ltd (t/a Kier Construction - Northern) [2021] EWHC 804 (TCC); [2021] BLR 431

Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29; [2021] BLR 555

Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2) [2021] NSWCA 93

Van Oord UK Ltd v Dragados UK Ltd [2021] CSIH 50; (2021) 38 BLM 10 8

Westminster City Council v Sports and Leisure Management Ltd [2021] EWHC 98 (TCC)

Judgments considered

Alexander v West Bromwich Mortgage Co Ltd [2016] EWCA Civ 496

Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd [2010] EWHC 1529 (TCC); (2010) CIL 2873

Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly called CV Buchan Ltd) [2016] EWHC 2509 (TCC); (2016) 33 BLM 10 3

Arcadis Consulting (UK) Ltd (formerly called Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly called CV Buchan Ltd) [2018] EWCA Civ 2222; [2019] BLR 27

Avoncroft Construction Ltd v Sharba Homes (CN) Ltd [2008] EWHC 933 (TCC)

Babcock Marine (Clyde) Ltd v HS Barrier Coatings Ltd [2019] EWHC 1659 (TCC); [2019] BLR 495

Balfour Beatty Civil Engineering Ltd and Another v Astec Projects Ltd [2020] EWHC 796 (TCC); (2020) 37 BLM 06 8

Bates v Post Office (No 3) [2019] EWHC 606 (QB)

Benfield Construction Ltd v Trudson (Hatton) [2008] EWHC 2333 (TCC); (2008) CIL 2633

Borrelli and Another v Ting and Others [2010] UKPC 21

Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] EWCA Civ 507; [2000] BLR 522

BPE Solicitors and Another v Hughes-Holland [2017] UKSC 21

Braganza v BP Shipping Ltd and Another (The British Unity) [2015] UKSC 17; [2015] 2 Lloyd's Rep 240

Bramall & Ogden Ltd v Sheffield City Council (1985) 29 BLR 73

Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25; [2020] BLR 497

Canada Steamship Lines Ltd v The King [1952] AC 192

Cavendish Square Holding BV v El Makdessi and ParkingEye Ltd v Beavis [2015] UKSC 67; [2016] BLR 1

Coburn LLP v GD Holdings Ltd [2013] EWHC 2879 (TCC)

Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd [2014] EWHC 2104 (Comm); (2014) 31 BLM 9 4; [2014] 2 Lloyd's Rep 457

Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd [2009] EWHC 3222 (TCC); [2010] BLR 89

Essex County Council v UBB Waste (Essex) Ltd (No 2) [2020] EWHC 1581 (TCC)

Global Switch Estates 1 Ltd v Sudlows Ltd [2020] EWHC 3314 (TCC); (2020) 38 BLM 01 5

Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC); [2015] BLR 704

Hitachi Zosen Inova AG v John Sisk & Son Ltd [2019] EWHC 495 (TCC); (2019) CILL 4302

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC); (2018) CILL 4153

Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15 (TCC); (2017) 34 BLM 3 3

Lloyd v Google [2019] EWCA Civ 1599

Matthew Harding (t/a MJ Harding Contractors) v Paice and Another [2016] EWCA Civ 1231; [2016] BLR 85

Meadowside Building Developments Ltd (in liquidation) v 12–18 Hill Street Management Co Ltd [2019] EWHC 2651 (TCC); [2020] BLR 65

Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200; [2013] BLR 265

MSC Mediterranean Shipping Co SA v Cottonex Anstalt [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep 494

Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2220 (TCC)

National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) [1993] 2 Lloyd's Rep 68

NKT Cables AS v SP Power Systems Ltd [2017] CSOH 38; (2017) 34 BLM 04 9

Nobahar-Cookson and Others v The Hut Group Ltd [2016] EWCA Civ 128

Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 (TCC); [2014] BLR 484

Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC); [2019] BLR 576

Pagnan SpA v Tradax Ocean Transportation SA [1987] 2 Lloyd's Rep 342

Parkwood v Laing O'Rourke Wales and West Ltd [2013] EWHC 2665 (TCC); [2013] BLR 589

PC Harrington Contractors Ltd v Systech International Ltd [2012] EWCA Civ 1371; [2013] BLR 1

Persimmon Homes Ltd v Ove Arup & Partners Ltd and Another [2017] EWCA Civ 373; [2017] BLR 417

Pilon Ltd v Breyer Group plc [2010] EWHC 837 (TCC); [2010] BLR 452

Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu) [2012] EWHC 273 (Comm); [2012] 1 Lloyd's Rep 501

Quietfield Ltd v Vascroft Construction Ltd [2006] EWCA Civ 1737; [2007] BLR 67

RGB P&C Ltd v Victory House General Partner Ltd [2019] EWHC 1188 (TCC); [2019] BLR 465

Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24; [2018] BLR 479

South Australia Asset Management Corporation v York Montague Ltd [1997] 80 BLR 1

Stein v Blake [1996] AC 243

Styles Wood Ltd v GE CIF Trustees [2020] EWHC 2694 (TCC)

Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC); [2017] BLR 189

Swansea Stadium Management Ltd v City and County of Swansea and Another [2018] EWHC 2192 (TCC); [2018] BLR 652

Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2004] EWHC 3319 (TCC)

Transocean Drilling UK Ltd v Providence Resources plc [2016] EWCA Civ 372; [2016] BLR 360

Triple Point Technology Inc v PTT Public Company Ltd [2019] EWCA Civ 230; [2019] BLR 271

Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB); [2013] BLR 147