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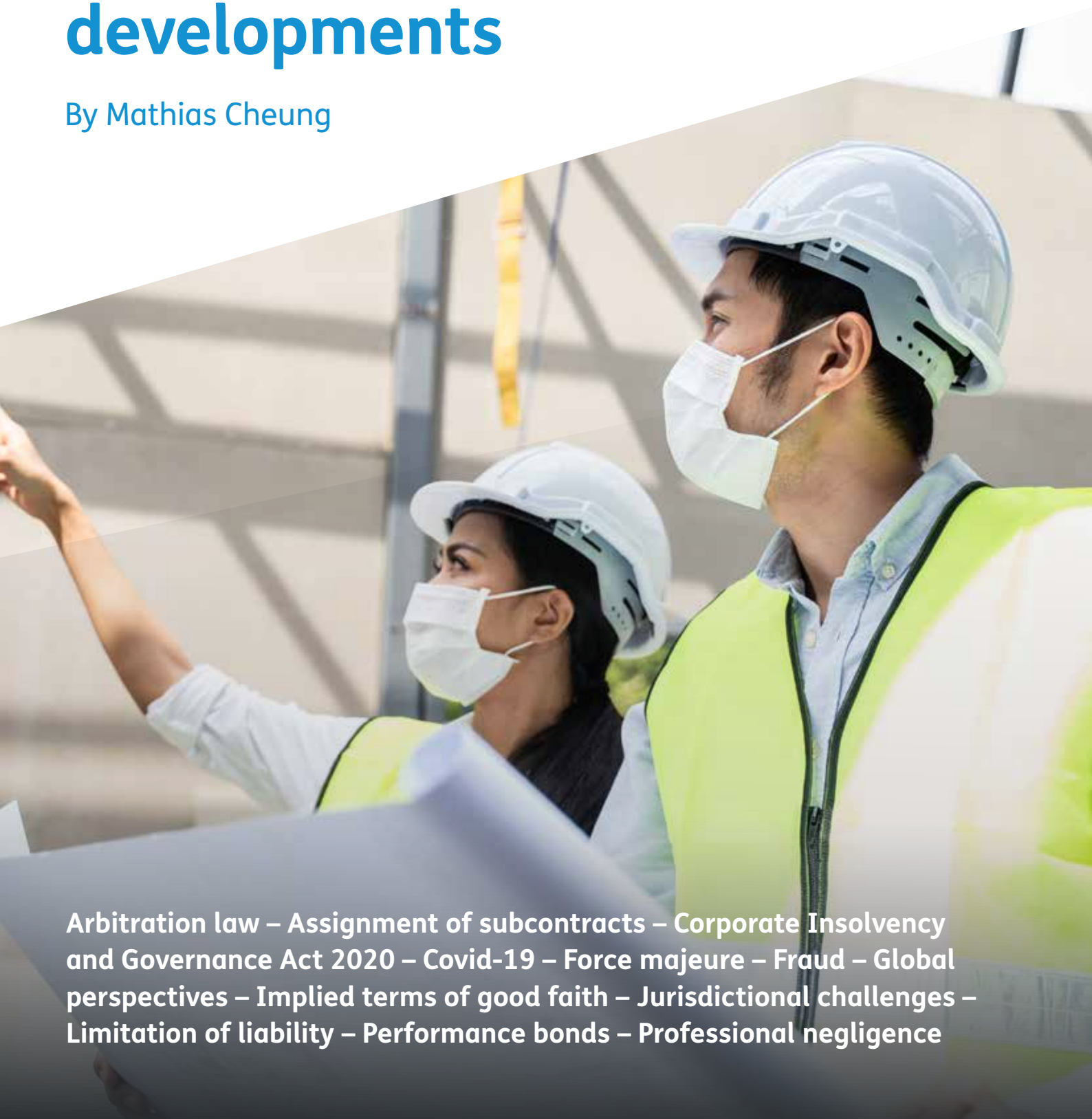
Construction law in 2020: key legal and industry developments

By Mathias Cheung



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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 Hong Kong International Arbitration Centre arbitration involving a construction project governed by the Macau Civil Code, a public inquiry into alleged defective steelwork in a high-profile railway project in Hong Kong, and an ongoing arbitration concerning one of the largest power stations in South Africa.

Mathias is ranked as an "Up and Coming" junior in Chambers & Partners (UK and Global) and a Tier 1 "Rising Star" in 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 2020: key legal and industry developments

By Mathias Cheung

This article summarises some of the key legal and industry developments in construction law in 2020, both in the UK and abroad. The past year has been universally challenging due to the widespread disruption caused by the Covid-19 pandemic, and on top of the usual diet of cases dealing with typical construction law issues, the courts have had the occasion to consider the impact of the coronavirus in a few interesting decisions. It is expected that the legal and construction industries will have to grapple with the continuing impact of the coronavirus in the year ahead.

In a *Building* magazine article published in May 2020 after the UK (and many other countries around the world) went into national lockdown, this author wrote as follows: "'There have been as many plagues as wars in history, yet always plagues and wars take people equally by surprise' – these words from Albert Camus' *The Plague* sum up how the Covid-19 pandemic has taken the world by storm."[1] This unexpected ordeal has inevitably resulted in significant disruption and uncertainty in commercial transactions, including within the construction industry.

Eight months on, the Covid-19 pandemic continues to evolve, with new mutations of the virus and a fresh wave of travel bans making headlines in the week before Christmas 2020. Looking back, the year 2020 will go down in history as one which is exceptional in terms of both the unprecedented impact of the pandemic and the remarkable perseverance and ingenuity shown in the global response to the crisis.

In such times of flux, the common law and its many well-established principles can step in to provide a degree of legal certainty, but at the same time, there is a danger of excessive legalism leading to results which were plainly not contemplated or intended when those principles were first laid down. A careful balance needs to be struck, so that legal certainty is maintained with an eye on the ability of the common law as a "living creature" to adapt to changing circumstances.

For this reason, a prominent group of jurists and former/current judges observed in a recent concept note that:

> "[a]dherence to the principle of legal certainty is fundamental, but within the principle of legal certainty, new thinking is going to be required if the law is to play its full part in getting international commerce back on its feet. Speaking to the BBC, Lord Neuberger, former President of the UK Supreme Court, introducing this project, said that 'the legal world has a duty to the rest of the world to prepare itself'."[2]

In many respects, the proliferation of case law in the courts in the UK and abroad over the past year represents that balance – on the one hand, recurrent themes in construction law and commercial transactions more generally continued to be dealt with based on well-established principles in the usual way, but on the other, the courts have adopted novel procedures to accommodate remote working and expedite urgent cases which can provide businesses with much-needed guidance on the interpretation of instruments in light of Covid-19.

In the Queen's Christmas Day message, Her Majesty reminded us that "even on the darkest nights there is hope in the new dawn". Above all, it is important to keep things in perspective and stay rooted in the many things which remain constant, even in a world of chaos. It is hoped that this annual overview of the key legal developments across different jurisdictions can help provide an element of certainty in this time of change, as we look at the consistent development of the legal landscape for the construction and infrastructure industries.

[1] Cheung, M, "Legal view: how to implement site operating procedures", *Building Magazine*, 4 May 2020.

[2] Lord Philips of Worth Matravers, Lord Neuberger of Abbotsbury, Sir David Edward, Sir William Blair, Professor Louise Gullifer, Professor Spyros Maniatis, Professor Eva Lein, Professor Malik Dahlan, Keith Ruddock and Judy Fu, *Breathing Space – Concept Note 2 on the effect of the 2020 pandemic on commercial contracts*, British Institute of International and Comparative Law, September 2020 update, at para 9.

IMPACT OF THE COVID-19 PANDEMIC

Operation of construction sites

In the wake of the national lockdown to curb the spread of the coronavirus in March 2020, there has been some uncertainty about the continuing operation of construction sites, as different approaches have been adopted in the various nations across the UK. Whereas the Scottish administration ordered construction sites to cease all work except in essential projects, the government in Whitehall has refused to go down that route, leaving it up to developers and contractors to decide whether their respective sites could, or should, remain open.

In the absence of any official guidance on the conditions for safely continuing with construction works during the ongoing pandemic, the Construction Leadership Council stepped in to publish a set of Site Operating Procedures (SOP) in late March 2020. This has subsequently gone through various revisions, the most recent being Version 6 dated 20 October 2020[3] based on the government's guidance, which was first published on 11 May 2020.[4]

The SOP emphasises the importance of maintaining health and safety on site and ceasing activities which cannot be undertaken safely, highlighting the possibility of enforcement action by the Health and Safety Executive in the event of a failure to comply with health and safety legislation and the government's Covid-19 advice. This is an obvious reference to the statutory obligations of duty-holders under the Construction (Design and Management) Regulations 2015 (CDM Regulations), in addition to other general obligations under, for example, the Health and Safety at Work etc Act 1974 and the Management of Health and Safety at Work Regulations 1999.

The SOP provides non-exhaustive guidelines on when workers should or should not go to work, the means of commuting, enhanced cleaning procedures, maintaining social distancing in the workplace, use of personal protective equipment and face coverings, and possible adjustments to various site facilities including points of access/egress, hygiene and toilet facilities, canteens and rest areas, and changing/shower rooms. These guidelines have been endorsed by the Secretary of State for Business, Energy & Industrial Strategy, and at the time of writing, they continue to apply to construction sites operating in areas which are subject to Tier 4 restrictions.[5]

Since the implementation of the SOP, there have been a significant number of queries regarding its application to specific construction sites, and above all, both employers and contractors have been concerned about the adequacy of the SOP for the purposes of discharging the various duties under the CDM Regulations – for instance, Regulation 4 requires a client (ie an employer) to make, review and maintain suitable arrangements to ensure that works can be carried out safely as far as reasonably practicable, and Regulation 13 requires a principal contractor to plan, manage and monitor the construction phase to ensure that works are carried out safely as far as reasonably practicable.

> Standard form contracts often place the risk of compliance with CDM Regulations on the contractor, which means that the additional costs of implementing the SOP may be irrecoverable and an extension of time may not be possible on a strict interpretation of many contracts

It is noteworthy that the emphasis of the CDM Regulations is on measures which are "reasonably practicable", and a principal contractor is required to apply the general principles of prevention (as defined by Schedule 1 to the Management of Health and Safety at Work Regulations 1999) by identifying the risks and putting in place proportionate measures to control those risks at source. Therefore, insofar as a party has considered and followed the SOP as far as reasonably practicable, it seems unlikely that there would be a material risk of exposure to enforcement actions.

Perhaps less straightforward are the contractual implications of complying with the SOP and the CDM Regulations. Standard form contracts such as the JCT form often place the risk of compliance with CDM Regulations

[3] Construction Leadership Council, "Construction Sector – Site Operating Procedures", Version 6, 20 October 2020.

[4] Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport, "Working safely during coronavirus (Covid-19) – Construction and other outdoor work" (last updated on 21 December 2020).

[5] Secretary of State for Business, Energy & Industrial Strategy, letter to the UK's construction sector, December 2020.

on the contractor, which means that the additional costs of implementing the SOP may be irrecoverable and an extension of time may not be possible on a strict interpretation of many contracts (subject to any express force majeure provisions).

This is a prime example of the need for parties to cooperate in good faith and agree a mutually beneficial way forward which enables work to continue in compliance with the SOP and the sharing of the unexpected burden of Covid-19, even if it means momentarily departing from the black letter of the contract. In this regard, the Cabinet Office has published some helpful guidance and recommendations on responsible contractual behaviour,[6] which will remain applicable until further notice in light of the ongoing impact of the pandemic.

Frustration

A subject of considerable debate is the applicability of the common law doctrine of frustration in the context of Covid-19, which could potentially excuse parties from the future performance of existing contracts and provide a basis for them to bring an end to contracts which no longer seem commercially viable.

Starting with frustration, the locus classicus of the formulation of the doctrine can be found in Lord Simon's speech in *National Carriers Ltd v Panalpina (Northern) Ltd,*[7] which made it clear that frustration does not arise simply because a party is put to considerable expense or inconvenience:

> "Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances ..."

It is trite law that the threshold for the doctrine of frustration to apply is a very high one, and we caught a glimpse of that in *Canary Wharf (BP4) T1 Ltd and Others v European Medicines Agency,*[8] where Smith J rejected the contention that the lease for the European Medicines Agency's headquarters in London had been frustrated due to Brexit.

Although there is yet to be an English decision on the application of the doctrine of frustration to a construction or commercial contract based on Covid-19, an illustration of the court's likely approach can be found in the recent decision of the Hong Kong Court of First Instance in *The Center (76) Ltd v Victory Serviced Office (HK) Ltd.*[9] In *The Center*, the claimant/landlord applied for summary judgment for repossession of its premises and for the payment of outstanding rent/mesne profits and other charges, and the defendant sought to argue that the tenancy agreement had in fact been frustrated due to the unforeseen social and economic disruption caused by Covid-19.

Applying the common law principles on the doctrine of frustration (including the test set out in *National Carriers*), Deputy High Court Judge To rejected the argument, on the basis that "[t]he Defendant leased the Premises for the purpose of providing flexible workspace to rent to its customers. ... There has been no change in the nature of the Defendant's obligation, though the social disruption and Covid-19 pandemic must have rendered its business operation more onerous and not profitable. The doctrine of frustration is not to be lightly invoked to relieve contracting parties of the normal consequences of imprudent commercial bargain or commercial risk ...".[10]

Therefore, if one applies the same reasoning to construction contracts, it seems unlikely that the financial and logistical difficulties caused by Covid-19 alone would be sufficient to reach the high threshold of frustration. A party relying on frustration would have to adduce cogent evidence to demonstrate that the nature (and not just the expense/onerousness) of the contractual rights/obligations have changed so significantly and it would be unjust to enforce the contract, and it is difficult to imagine how anything short of a physical impossibility for the construction works to continue for the foreseeable future would suffice.

6 Cabinet Office, "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency" (updated on 30 June 2020) .
7 [1981] AC 675, p 700.
8 [2019] EWHC 335 (Ch).
9 [2020] HKCFI 2881.
10 Ibid, at para 39.

Force majeure

In contrast, express force majeure clauses in construction contracts (which are commonly found in various standard forms) may provide an avenue for extensions of time and/or termination. The expression "force majeure" is itself borrowed from French law,[11] where the phrase contemplates an event which prevents a party's performance of its obligations, which is beyond its control, which could not reasonably have been foreseen at the time of contract, and whose effects could not be avoided by appropriate measures.

In the early case of *Lebeaupin v Richard Crispin & Co,*[12] McCardie J referred to various French authorities and observed that an epidemic (amongst other things) could amount to an event of force majeure. As a general statement, that is relatively uncontroversial, but whether an event of force majeure has actually arisen on a particular set of facts is a question of fact in every case. This is illustrated by the decisions of the French courts, which have considered whether a particular epidemic constitutes force majeure on a case-by-case basis.

For instance, in *Holding Savanna RCS SARL v 81-XXX SAS*,[13] the appellant argued that its obligation to pay rent was suspended as a result of the Ebola outbreak in West Africa, which caused a crisis in the hotel sector in Senegal (its source of revenue). The Paris Court of Appeal held that the location of the leased premises did not make the fulfilment of the appellant's obligations impossible, such that the conditions of force majeure were not met.

The result in *Holding Savanna* can be contrasted with the recent ruling of the Paris Court of Appeal in the case of *Total Direct Énergie SA v Electricité de France SA*,[14] concerning a framework agreement under which Total Direct Énergie (TDE) subscribed to a certain volume of electricity supply from Electricité de France (EDF) at a fixed price.

The Covid-19 pandemic has led to a decline in energy consumption and a corresponding fall in electricity prices, which meant that TDE was forced to purchase electricity from EDF at the fixed price and resell the electricity to end-users at a much lower price. TDE therefore sought to suspend the agreement by invoking a clause which defined force majeure as "an extraneous, irresistible and unforeseeable event making it impossible to perform the parties' obligations in reasonable economic conditions".

The Paris Commercial Court granted an interim order for the suspension of the framework agreement, and this has now been confirmed by the Paris Court of Appeal, which concluded that the Covid-19 pandemic coupled with the French government's measures amount to force majeure as they have caused a very significant impact on electricity consumption and the level of electricity prices.

It is important to note that the court's ruling in *TDE v EDF* was firmly based on the express reference in the force majeure clause to the prevention of performance "in reasonable economic conditions". Therefore, this decision is by no means an unconditional confirmation that Covid-19 amounts to force majeure under every contract or under any set of facts.

Indeed, this author has recently been involved in an adjudication regarding the interpretation of force majeure under a JCT form of contract, where a contractor sought a blanket declaration that Covid-19 amounts to an event of force majeure, without having to consider the causal impact of the pandemic on the project in question. This argument was roundly rejected by a very experienced adjudicator, as it is necessary to demonstrate that the event relied on has actually prevented performance on site.

Therefore, while previous cases can be instructive, it is clear that the question of whether Covid-19 amounts to force majeure is incredibly fact-sensitive, and in order to invoke a force majeure clause in any given case, parties should adduce factual evidence to explain how the pandemic has prevented them from continuing the works, and why that was beyond their control and could not have been reasonably avoided.

Force majeure typically contemplates an event which physically or legally prevents performance, and express words are normally required if a mere hindrance (in the sense of performance being more onerous or difficult) is to suffice for the purpose of a force majeure clause, an example of which can be seen in *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd*.[15]

The distinction between the notions of prevention and hindrance was considered in a somewhat different context in the test case of *The Financial Conduct Authority v Arch Insurance (UK) Ltd and Others*,[16] which dealt with

11 See eg Article 1218 of the French Civil Code (as amended in 2016).
12 [1920] 2 KB 714.
13 Case no 15/12113, Cour d'Appel de Paris, 29 March 2016.
14 Case no 20/06689, Cour d'Appel de Paris, 28 July 2020.
15 [1917] AC 495.
16 [2020] EWHC 2448 (Comm); [2020] Lloyd's Rep IR 527.

the application of disease clauses, prevention of access clauses and hybrid clauses to Covid-19 under various business interruption policies for insured premises. In the Divisional Court, Flaux LJ and Butcher J considered the decision in *Tennants*[17] and reaffirmed that "'Prevention' is to be contrasted with and is not synonymous with 'hindrance'" when interpreting these words in business interruption policies.[18] These observations are equally relevant to the interpretation of force majeure clauses which often refer to "prevention" and/or "hindrance", and it is noteworthy that this part of the judgment has not been challenged in the appeal to the Supreme Court.[19]

Dispute resolution in the age of Covid-19

Due to the social-distancing measures in response to the Covid-19 pandemic, the Judiciary of England and Wales issued the Civil Justice in England and Wales: Protocol regarding Remote Hearings on 22 March 2020,[20] which encouraged the use of remote hearings wherever possible. The objective is to ensure that the machinery of justice can continue to operate in a radically changed environment, as a wholesale adjournment of all hearings would be far too disruptive and would create a significant backlog – after all, as the old adage goes, justice delayed is justice denied.

The guidance envisages that there may be circumstances where a case would need to be adjourned "because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time". Unsurprisingly, some parties have tried to apply for an adjournment on the basis that a remote trial would be challenging or undesirable.

In *Re Blackfriars Ltd*, [21] Deputy High Court Judge John Kimbell QC ordered that a five-week trial listed in June 2020 should be held remotely, and he observed that there was "... a clear and consistent message ... that as many hearings as possible should continue and they should do so remotely as long as that can be done safely".[22] In particular, the judge refused to adjourn the trial based on potential technological challenges, as the parties were expected to cooperate and plan the remote trial (eg by sourcing a remote trial platform and making enquiries about broadband connections and bandwith).[23]

The above can be contrasted with *Muncipio De Mariana and Others v BHP Group plc*,[24] where HHJ Eyre QC echoed the approach taken in *Re Blackfriars,* but noted that "... the court must be conscious that it is likely to take longer and require more work to achieve a particular result (such as the production of evidence) by remote working than would be possible by more traditional methods ...", and that "... the court must have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic ...".[25]

> Whether Covid-19 amounts to force majeure is incredibly fact-sensitive, and in order to invoke a force majeure clause in any given case, parties should adduce factual evidence to explain how the pandemic has prevented them from continuing the works, and why that was beyond their control and could not have been reasonably avoided

In *Muncipio*, HHJ Eyre QC decided to adjourn the seven-day hearing listed in June 2020 (which was for an application to stay proceedings on jurisdictional grounds), as the defendants managed to show that the preparation of the reply evidence would take much longer due to the need to prepare the evidence of the Brazilian expert witness remotely. However, the judge limited the length of the adjournment and relisted the hearing in July 2020 to be conducted remotely. Parties should therefore keep any request for an adjournment to a minimum, as the court would be wary of lengthy delays to a hearing or trial.

The adjournment of a listed hearing or trial is very much the exception rather than the rule, and the courts – including the Technology and Construction Court (TCC) – have so far managed to conduct numerous remote hearings and trials successfully. The objective of the court is to resolve as many cases as possible in as expeditious a manner as practicable.

17 *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495.
18 Ibid, at paras 324 to 336.
19 *The Financial Conduct Authority and Others v Arch Insurance UK Ltd and Others* [2021] UKSC 1; [2021] Lloyd's Rep IR 63.
20 Judiciary of England and Wales, "Civil Justice in England and Wales – Protocol Regarding Remote Hearings" (updated on 26 March 2020).
21 [2020] EWHC 845 (Ch).
22 Ibid, at para 32.
23 Ibid, at paras 41 to 52.
24 [2020] EWHC 928 (TCC); [2020] BLR 421.
25 Ibid, at para 32.

In fact, the same desire to facilitate the expeditious resolution of disputes also applies to alternative dispute resolution (ADR). In *Millchris Developments Ltd v Waters*,[26] Jefford J rejected a responding party's attempt to injunct an ongoing adjudication on the basis of Covid-19. The judge was not persuaded by the solicitor's apparent inability to take a proof of evidence from the relevant witnesses due to the need to self-isolate, and she observed that other professional commitments due to remote working were simply a function of any busy practice.[27] Finally, she pointed out that the parties and their representatives had no right to be present at an adjudicator's site visit, such that it was also not a reason for preventing the parties from proceeding with the adjudication.[28]

The message is clear: Covid-19 may have caused significant disruption to numerous businesses and industries, but when it comes to dispute resolution, parties should be prepared to cooperate and work out a way to progress matters remotely, be it litigation or adjudication, unless there are compelling reasons for in-person attendance which would not be safe to conduct in the circumstances. This should be welcomed by the construction industry, as the availability of effective forums for dispute resolution is essential to its continued success.

DEVELOPMENTS IN PAYMENT DISPUTES AND ADJUDICATION

The interim payment and adjudication regime under the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 has remained as active as ever, and indeed, the attraction of a speedy and cost-efficient way of obtaining interim payment and resolving disputes (at least temporarily) has understandably grown as a result of the financial disruption caused by the pandemic. The courts have considered a number of interesting issues ranging from the validity of payment applications to challenges based on jurisdiction and natural justice. This adds to a growing body of jurisprudence which provides helpful guidance to parties embarking on future adjudications.

Payment disputes

The validity of a payment notice often becomes an issue (in the context of either an adjudication or a Part 8 claim for declarations) when the parties have competing interpretations of the applicable due dates and final dates for payment. This situation arose in the case of *Rochford Construction Ltd v Kilhan Construction Ltd*[29] – in an attempt to challenge an adjudicator's decision on the sum due and payable under Kilhan's interim payment application, Rochford sought Part 8 declarations to the effect that Kilhan's payment application was invalid and/or that the final date for payment had not crystallised due to the absence of an invoice.

On the validity of the payment application, Rochford contended that the contract required each application to be made on the last day of each month in order to be valid. Cockerill J considered that the words "Application date end of month" in the contract particulars were ambiguous, and were more likely to be a reference to the end of each relevant period for a payment application – nothing in the wording or the factual background suggested that this was a condition precedent for the validity of a payment application.[30] Moreover, the judge considered that such an interpretation would lead to a practical oddity, as "... it will rarely be practicable to compile a claim or invoice accurately for the entirety of the month, including that day, and submit it within that day".[31]

26 [2020] EWHC 1320 (TCC); (2020) 37 BLM 05 5.
27 Ibid, at paras 25 to 29.
28 Ibid, at paras 30 to 32.
29 [2020] EWHC 941 (TCC).
30 Ibid, at paras 25 to 28.
31 Ibid, at para 34.

Interestingly, the contract in question appeared to contemplate payment applications by reference to a payment schedule, but no such schedule was ever incorporated. In those circumstances, Cockerill J considered that "... in the absence of the schedule they did not intend an impractical and unworkable solution. The effect was to leave the date for submission of the claim at large", and this was largely consistent with what the parties actually did.[32] While subsequent conduct is not strictly admissible for the purpose of contractual interpretation, it is clear that the court is mindful not to reach a conclusion which conflicts with how the parties actually operated a contract, and parties advancing contractual arguments which are divorced from reality will often face an uphill struggle.

> It is of utmost importance to ensure that an application (in addition to being timeous) specifies the due date it relates to, and that it values the works up to the prescribed end of the relevant period rather than some other arbitrary date

The question then was to what extent the Scheme for Construction Contracts (the Scheme) should apply in order to fill the gaps left by the deficiencies in the contract. In terms of the due date, Cockerill J held that para 4 of the Scheme would apply and the due date was the date when the claim was made.[33] As for the final date for payment, the judge concluded that the words "Payment terms 30 days from invoice as per attached payment schedule" gave rise to too much uncertainty and were impractical in the absence of a payment schedule:

> "... Pegging the final date to service of an invoice, which is itself pegged to a payment certificate, is simply impractical. The best way of mending the misfire caused by the parties' incomplete drafting of the contractual documents, which is the position which one faces here, is effectively the one on which the adjudicator settled. Accordingly, regardless of a position on the legal point, I would reach the conclusion that the statutory Scheme comes into play as regards the final date for payment."[34]

The main takeaway from Cockerill J's decision is that "... the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism",[35] and the Scheme therefore had to step in to render the payment provisions workable. This is valuable guidance for the drafting of payment mechanisms in the future, as it is not uncommon (despite s110(1A) of the HGCRA) to see contracts with due dates or final dates for payment which are conditional upon the performance by the employer of a certain act or obligation, and this author has dealt with such provisions in a number of recent adjudications.

The solution adopted in *Rochford* is a good illustration of the approach advocated by Coulson LJ in *Bennett (Construction) Ltd v CMC MBS Ltd (formerly Verbus Systems Ltd)*[36] (which was covered in the last year's review), namely the piecemeal incorporation of specific provisions from the Scheme in order to remedy any gaps in the contractual provisions. To avoid having similar disputes in the future, parties should take care during their pre-contractual discussions to ensure that the draft payment mechanism is workable and that its effect is properly understood by both parties.

Another common challenge to the validity of a payment application is based on non-compliance with the contractual requirements for such applications, and *RGB Plastering Ltd v TAWE Drylining and Plastering Ltd*[37] was one such case. In *RGB* (which was yet another Part 8 claim for declaration), it was contended that the application was late, not submitted to the prescribed email address, and did not value works up until the relevant payment due date under the subcontract. The question for the court was whether the payment application was sufficiently clear and unambiguous in its form, substance and intent.

On the facts, HHJ Jarman QC concluded that it could not be inferred that RGB knew or ought to have known what to do with the payment application and when, because the application was not only late but not compliant with various contractual requirements:

> "The application was not only late, ... but it did not value the works to 3 May or 2 June 2019. It was not sent to the email address set out in the payment schedule. In these respects, the application did not comply with the requirements of the subcontract. It was not clear or unambiguous so that the parties could know what to do about it or when. In my judgment it is invalid."[38]

32 Ibid, at paras 43 and 44.
33 Ibid, at para 47.
34 Ibid, at para 56.
35 Ibid, at para 58.
36 [2019] EWCA Civ 1515; [2019] BLR 587.
37 [2020] EWHC 3028 (TCC); (2020) CILL 4564.
38 Ibid, at para 25.

This case is a timely reminder for contractors submitting payment applications that it is of utmost importance to ensure that an application (in addition to being timeous) specifies the due date it relates to, and that it values the works up to the prescribed end of the relevant period rather than some other arbitrary date. One should not underestimate the importance of the formality requirements prescribed by the contract, and all it takes to avoid such pitfalls is to read the payment procedure carefully and establish an appropriate template and system at the start of a project.

It is worth mentioning that in *RGB*, TAWE attempted to introduce an estoppel argument, but this was done at a much later stage in a witness statement submitted two days before the hearing. The judge held that there was no good reason for the lateness of introducing the argument and filing the reply evidence,[39] having regard to the overriding objective of the Civil Procedure Rules (CPR) and the principles set out in *Denton and Others v TH White Ltd and Others.*[40]

It should come as no surprise that estoppel arguments in respect of payment disputes have a very high threshold in any event, and both parties would have to adduce a certain amount of factual evidence in order to properly address the issue. If a party wishes to rely on estoppel as an alternative defence to the alleged invalidity of a payment application/notice, this should always be pleaded/advanced at the earliest possible stage in any adjudication or litigation.

Stay of execution for "smash and grab" adjudication decisions

The past year has seen two particularly interesting examples of a party seeking a stay of execution in response to the enforcement of a "smash and grab" adjudication decision. First, in *Broseley London Ltd v Prime Asset Management Ltd*,[41] the claimant sought to enforce an adjudication decision ordering the payment of the notified sum for valuation 19, but the defendant argued that there should be a stay of execution pending the determination of the true value of the account between the parties in a further adjudication.

The defendant's contention impinged on Jackson LJ's observation in *S&T (UK) Ltd v Grove Developments*[42] (which was discussed in the annual review for 2018) that a "true value" adjudication could only be commenced after the notified sum has been paid, and so the defendant would in fact have to commence Part 7 proceedings in order to establish the true value of valuation 19 – a step which had not been taken. Instead, the defendant had attempted to commence an adjudication in respect of the value of the final account, but the referral was subsequently withdrawn.

Deputy High Court Judge Roger ter Haar QC roundly rejected the defendant's argument and observed that a stay of execution based on an intended true value adjudication "... would permit the adjudication system to trump the prompt payment regime, which is exactly what the Court of Appeal said in para 107 of that case would not be permitted to happen".[43]

The defendant's alternative argument was that a stay should be granted to allow the defendant to commence Part 7 proceedings. However, the judge was mindful of the fact that no steps had been taken since the adjudication decision was issued in September 2019 to commence any such proceedings, and he was satisfied that the defendant's failure to pursue its cross-claim with diligence was a bar to the application for a stay of execution.[44] This was also fatal to the argument that the claimant would probably be unable to repay the judgment sum, as the judge took the view that "... if PAML had moved with due diligence and in accordance with *S&T*, it could have had a result by adjudication of its alleged entitlements before the Covid-19 crisis blew up, and at a time when BLL would, on my findings, have been able to repay".[45]

This is a salutary reminder that a party intending to seek a stay of execution should take prompt and active steps to commence proceedings in order to pursue a cross-claim and/or challenge an adjudicator's findings, as the court would be astute to reject an application for a stay if there does not appear to be a genuine intention to do so.

The above can be contrasted with the decision in *JRT Developments Ltd v TW Dixon (Developments) Ltd*,[46] where HHJ Watson was satisfied that JRT's financial condition (even though not technically insolvent) satisfied the three-limb test laid down by *Wimbledon Construction Company 2000 Ltd v Derek Vago*,[47] namely that: (i) JRT would probably be unable to repay the judgment sum;

39 Ibid, at paras 26 to 36.
40 [2014] EWCA Civ 906; [2014] BLR 547.
41 [2020] EWHC 944 (TCC); (2020) 37 BLM 06 1.
42 [2018] EWCA Civ 2448; [2019] BLR 1, at paras 104 to 110.
43 *Broseley*, at para 46.
44 Ibid, at paras 50 to 55.
45 Ibid, at para 68.
46 Unreported, HT-2020-BHM-000010, 8 October 2020.
47 [2005] EWHC 1086 (TCC); [2005] BLR 374.

(ii) it was not in a similar financial position at the time of contract; and (iii) its financial difficulties were not due wholly or in significant part to the non-payment of the sums awarded in the adjudication. This was based on evidence of JRT's payment arrangements with its creditors and high interest rates on its loans, together with evidence of disputes and alleged defects in JRT's other existing projects,[48] and the financial risk increasing significantly since the time of contract.

Of particular interest is HHJ Watson's further conclusion that there would be manifest injustice if the decision were to be enforced without a stay of execution. Although this is an exceptional ground for granting such a stay, the judge was satisfied on the facts that TW Dixon would be forced into liquidation if required to pay the full judgment sum, and that this would be unjust because JRT's claim appeared to include unsubstantiated sums and a mark-up for overheads and profit which did not appear to be supported by the parties' commercial agreement, and JRT only relied on the contractual payment provisions for the first time after the termination of the contract.[49]

The *JRT* decision provides an interesting example of a stay of execution being granted in circumstances where the successful party in a smash and grab adjudication is facing financial difficulties and appears to have made dubious claims for payment, which necessarily involves some consideration of the underlying merits of the disputed payment claim during the enforcement hearing. Parties should not expect this to become a new norm, as the unusual commercial/funding relationship in the *JRT* case played an important part in the judge's findings on manifest injustice.

Nevertheless, the decision in *JRT* does illustrate the potential risks of embarking on a smash and grab adjudication as a convenient way of improving cash flow, especially in light of the financial difficulties caused by the ongoing Covid-19 pandemic. Even if the adjudication proves to be successful, parties in a poor financial condition should be prepared to answer an application for a stay of execution, as the court will clearly be willing to grant such a stay in an appropriate case if there are serious doubts about the viability of the successful party as a going concern.

Enforceability of declarations as to valuation

The TCC has provided helpful clarification in *WRW Construction Ltd v Datblygau Davies Developments Ltd*[50] in respect of the enforcement of adjudication decisions which consist of a declaration of the value of an account rather than an order for payment. Prior to this case, there was no direct judicial authority on the issue. In *WRW*, the adjudicator declared that the sum payable by WRW to Datblygau was a negative sum, which meant that there was in fact an overpaid sum which was repayable by Datblygau to WRW, but the adjudicator stopped short of ordering Datblygau to pay WRW.

Recorder Andrew Singer QC (sitting as a TCC judge) held that the adjudicator's declaration provided a sufficient basis for the court to make an order for payment upon enforcing the adjudicator's decision, and it was unnecessary to commence a further adjudication simply to obtain an order for payment:

> "In my judgment, there is no bar on the basis of the authorities cited to me to the court enforcing a temporarily binding valuation in an adjudication award by making an order for payment of the monies due as a result of that valuation. Indeed, in my judgment it would be contrary to principle and established authority for the court to effectively force a party which has the benefit of an award in its favour as far as a balance being due to it, thereafter to have to commence a further adjudication (to which there is no defence) for the purpose of obtaining an order for payment from the adjudicator before returning to the court if necessary, for further enforcement proceedings."[51]

The court's conclusion in *WRW* seems perfectly sensible on the facts, given that the adjudicator had considered all the parties' competing claims and entitlements as part of his valuation of the termination account, and clause 8.7.5 of the JCT Design and Build Conditions 2011 provided that the net balance between the parties is due and payable as a debt.

However, it is not immediately apparent whether the decision in *WRW* is equally applicable in circumstances where the net balance under a final/termination account has to be claimed in a specific payment application which would trigger the timetable for final payment, or where the adjudicator's valuation only pertains to part of the account and there are outstanding cross-claims/set-offs

48 *JRT*, at paras 54 to 58.
49 Ibid, at paras 89 to 103.
50 [2020] EWHC 1965 (TCC); [2020] BLR 623.
51 Ibid, at para 19.

or even disputes about the sums previously paid. There may be an argument for saying that it would not be appropriate for the court to make an order for payment in these circumstances, and it would be interesting to see whether the court would qualify the approach taken in *WRW* in a future case.

Construction operations under the HGCRA

The scope of "construction operations" under the HGCRA and the express exclusions in s105(2) of the Act came into sharp focus in 2020, starting with the Court of Appeal's decision in *C Spencer Ltd v MW High Tech Projects UK Ltd*[52] – readers will recall the brief discussion of the TCC decision in this matter in last year's review. This case arose from MW's subcontract with C Spencer for civil, structural and architectural works in the Energy Works Hull project, which involved the design and construction of a waste-to-energy fluidised bed gasification plant.

The bulk of the subcontract works were "construction operations" within the meaning of s105(1) of the HGCRA, but the works also included the assembly of plant, and erection of steelwork to provide support or access to plant and machinery which were excluded from the scope of the HGCRA. C Spencer sought payment of the sum claimed under its payment application no 35, on the basis that MW's payment notice did not allocate a sum for construction operations only and was therefore invalid. C Spencer commenced Part 8 proceedings for a declaration to that effect, but this argument was rejected by O'Farrell J at first instance.

The Court of Appeal had little difficulty dismissing C Spencer's appeal for largely the same reasons given by O'Farrell J. Coulson LJ observed that the starting point was to consider the subcontract terms, as the HGCRA "... itself envisages that the parties will contract on terms which they agree between themselves" and only identifies "certain minimum provisions".[53] Importantly, parties are "... at liberty to agree payment terms which complied with the Act in respect of both construction and non-construction operations", and this has become commonplace in many standard form contracts.[54]

The key point is that nothing in the HGCRA requires parties under a hybrid contract to include a term requiring the separate or distinct notification and breakdown of sums due in respect of construction operations only, and parliament could have easily done so if that were the intention.[55] Indeed, where the parties have agreed a single payment regime for all the works, "requiring parties to a hybrid contract to deal separately with construction and non-construction operations for every interim payment application ... would create additional layers of complexity and cost".[56] In the circumstances, MW's payment notice complied with the subcontract terms and was perfectly valid.

However, it is important to note that the distinction between construction and non-construction operations would be relevant if there was a dispute about the sums applied for which had to be referred to an adjudication, and this was the issue which previously arose in *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture*.[57] Unless the right to adjudicate is extended by contract to non-construction operations, the adjudicator's jurisdiction would be confined to a dispute relating to the construction operations, and so an allocation would be required at the referral stage (but not before that).[58] Parties should therefore bear this in mind when referring any payment dispute under a hybrid contract to adjudication, as the absence of a proper allocation at that stage may well give rise to a jurisdictional challenge by the responding party.

> Nothing in the HGCRA requires parties under a hybrid contract to include a term requiring the separate or distinct notification and breakdown of sums due in respect of construction operations only

The plant in Hull is a project that keeps giving, as it led to another decision in 2020 which would have a wider impact on adjudications relating to waste-to-energy plants. Readers will recall from last year's review that the TCC had been asked to consider whether the primary activity of the waste-to-energy plant in Hull (the same one which gave rise to the *C Spencer* decision discussed above) was power generation, such that the works fell

52 [2020] EWCA Civ 331; [2020] BLR 364.
53 Ibid, at para 39.
54 Ibid, at paras 40 and 41.
55 Ibid, at paras 43 to 46.
56 Ibid, at para 63.
57 [2010] EWHC 1076 (TCC); [2010] BLR 415.
58 *C Spencer*, at paras 54 and 55.

within the exclusion in s105(2)(c) of the HGCRA.[59] This culminated in O'Farrell J's decision in *Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd*,[60] which held that the adjudicator had no jurisdiction because the primary activity at the plant in Hull was power generation rather than waste treatment.

O'Farrell J reached this conclusion on the basis that: (i) the subcontract described the works as a gasification facility receiving refuse-derived fuel which had been pre-treated by others with limited treatment of the waste at the plant; (ii) the performance of the plant was measured by reference to heat and energy production rather than waste throughput; (iii) the subcontract required Fabricom to achieve R1 (energy recovery) status for the plant to qualify for a change of status upon an application to the Environmental Agency; (iv) the factual evidence indicated that the plant was not developed or intended to be operated in furtherance of any particular waste or energy policy; and (v) the funding model for the facility estimated that most of the revenue would be generated by electricity exports to the National Grid and subsidies/grants.[61]

It followed from O'Farrell J's factual findings that the works under the subcontract were excluded from the scope of the HGCRA, and because the contractual adjudication provisions applied "… only to the extent (if any) required by the Construction Act", the adjudicator in the parties' first and second adjudications did not have any jurisdiction and both of the adjudication decisions obtained by Fabricom were unenforceable.

O'Farrell J's decision demonstrates that the court will not necessarily construe the exclusions in s105(2) of the HGCRA narrowly, and for waste-to-energy plants involving a relatively small element of waste treatment which is ancillary to the combustion and power generation process downstream, the statutory payment and adjudication provisions are unlikely to apply to the relevant building and engineering contracts. This can of course be circumvented by the inclusion of contractual adjudication provisions, but parties should be careful not to link such provisions to the applicability of the HGCRA (as in the subcontract between MW and Fabricom).

It is worth pointing out that both Coulson LJ and O'Farrell J had reservations about the wisdom of maintaining the exclusions in s105(2) of the HGCRA. In *C Spencer*, Coulson LJ noted that "[u]nfortunately, the Act is not as comprehensive as it might have been. It was suggested during the Parliamentary debates that the then government was (in the words of Lord Howie of Troon) 'got at by some big, powerful, important interests in what are called the process industries. They yielded to those pressures and in so doing lost sight of the aim of the Bill'".[62] In *Engie Fabricom*, O'Farrell J cited Coulson LJ's comments and agreed that the exclusions were probably ripe for reconsideration:

> "There is a powerful argument for the ambit of the adjudication provisions in the 1996 Act to be reconsidered, following more than 20 years of statutory adjudication and having regard to developments in construction-related industries. Statutory adjudication is widely considered to be a success throughout the construction industry. It is recognised that there will always be residual injustices where a party is forced to make disputed payments to another without the benefit of a full trial but the advantages of early dispute evaluation and payment far outweigh the disadvantages of an interim finding that later proves to be wrong. …"[63]

The industry will need to wait and see whether there is sufficient impetus for repealing the exclusions in s105(2) of the HGCRA as part of the wider proposed reforms to the statutory regime, but it is certainly difficult to maintain a rational justification for the continued exclusion of the construction of power generation facilities from the statutory adjudication provisions. For now, parties under hybrid contracts and contracts for excluded operations will have to resort to careful drafting in order to achieve the same result envisaged by the HGCRA for construction operations.

59 *Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd* [2019] EWHC 1876 (TCC); [2019] BLR 514.
60 [2020] EWHC 1626 (TCC); [2020] BLR 631.
61 Ibid, at paras 150 to 154.
62 *C Spencer*, at para 2.
63 *Engie Fabricom*, at para 75.

Jurisdictional challenges

Jurisdictional challenges continue to be a common basis for resisting enforcement of an adjudication decision, and two particular decisions from the past year are worth mentioning. In *Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd*,[64] the court had to determine whether an adjudicator's nomination/appointment was valid under the Scheme. This question arose because the referring party (Kingstone) applied to the Royal Institute of Chartered Surveyors for the nomination of an adjudication before serving the notice of adjudication on the responding party (Lane End) at a meeting later that day.

Paragraph 2(1) of Part I of the Scheme provides for the referring party to submit its request for the appointment of an adjudicator "… following the giving of a notice of adjudication". Although Kingstone contended that para 2(1) should not be followed because para 1(1) of the Scheme (as amended) allows a notice of adjudication to be given "at any time", HHJ Halliwell showed little hesitation in rejecting this argument:

> "There is nothing to suggest that the amendment to para 1(1) might somehow have been intended to alter or modify the sequence in which a party could be expected to serve notice of adjudication and submit its request to the adjudicator or nominating body. Had he intended to alter or modify the relevant sequence, the Secretary of State could have been expected to do so in clear terms. He did not do so. Moreover, it remains the case that the request must itself be accompanied by a copy of the notice of adjudication, under para 3, which is itself consistent with the proposition that the request should not precede the notice itself. …"[65]

Kingstone sought to get around the adjudicator's lack of jurisdiction under the Scheme on the basis of an alleged waiver by election and/or estoppel. HHJ Halliwell concluded that the issue of waiver did not strictly arise, as the absence of a valid notice of adjudication meant that no adjudication was ever commenced and the adjudication was not appointed at all, and "[i]t follows that Lane End was not presented with a choice under which it was furnished with the opportunity to cede a right …".[66]

As for estoppel, although Kingstone "threw in the kitchen sink" and purportedly relied on promissory estoppel, estoppel by representation, estoppel by convention and estoppel by acquiescence, there were insufficient facts to support any of these contentions in circumstances where Lane End challenged the validity of the adjudicator's appointment during the adjudication and also reserved its right to do so.[67] Short of some clear and unequivocal representation or conduct and convincing evidence of a material detriment, it is quite unlikely that any court would accede to arguments of estoppel in such circumstances.

A rather novel argument was advanced in *MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd*,[68] which related to a subcontract between MW and Balfour Beatty for the installation of mechanical and electrical services in a new laboratory building at Dansom Lane, Hull.

Balfour Beatty issued a notice of delay in March 2018 claiming a seven-week extension of time, followed by further notices from April 2018 to February 2019 which resulted in a cumulative extension of time claim of 31 weeks. Finally, in July 2019, Balfour Beatty issued an expert report which opined that MW's under-resourcing and delayed boarding and studwork had caused 282 days of critical delay to the subcontract works. Balfour Beatty then commenced an adjudication and successfully claimed a 282-day extension of time, which prompted MW to seek Part 8 declarations as to the adjudicator's lack of jurisdiction.

64 [2020] EWHC 2338 (TCC); [2020] BLR 599.
65 Ibid, at para 32.
66 Ibid, at para 49.
67 Ibid, at paras 65 to 73.
68 [2020] EWHC 1413 (TCC); (2020) 37 BLM 07 7.

MW's argument was that there was no crystallised dispute because the expert report of July 2019 amounted to a notification of a new delay claim (or alternatively, the expert report amounted to further particulars of a previous claim) which MW had yet to respond to, as the contract allowed a period of 16 weeks from the receipt of the required particulars (which could be contained in the claim notice or in a separate document) for MW to notify its decision on the claim.

As a starting point, O'Farrell J observed that "[i]f the additional notification did not change the fundamental nature and basis of the claim, the contractor would remain under an obligation to respond within the timeframe set out in clause 2.18. However, if the additional information, objectively assessed, gave rise to a new claim, the contractor would be entitled to a fresh 16-week period to consider such new claim before there could be any dispute". This would allow MW a reasonable period to respond to a claim while preserving Balfour Beatty's right to have a dispute determined speedily.[69]

> Allegations of breach of natural justice are commonly made in an attempt to resist enforcement of an adjudicator's decision, but such arguments will usually fail save in the plainest of cases

On the facts, O'Farrell J considered that each of the notices of delay contained the material causes and effects of the delay and provided the particulars required by the subcontract, and MW failed to notify any decision within 16 weeks without any real explanation as to what further information was required.[70] She further concluded that the expert report was not a fresh notification of a claim but evidence to support Balfour Beatty's previously notified claims, in respect of which there was clearly a crystallised dispute given MW's failure to provide any response.[71]

This decision reconfirms the court's readiness to find that a dispute has properly crystallised where a lengthy period has elapsed between the notification of a claim and the commencement of an adjudication, and it would have very little sympathy with a party which is clearly prevaricating or making tactical requests for information which are calculated to postpone the other party's right to refer a dispute to adjudication. As the courts have emphasised time and again, unless the claim presented is so nebulous and ill-defined that it cannot be sensibly responded to, neither silence nor an express non-admission would prevent a dispute from crystallising.[72]

Breach of natural justice

Allegations of breach of natural justice are commonly made in an attempt to resist enforcement of an adjudicator's decision, but such arguments will usually fail save in the plainest of cases.[73] The past year has seen a number of decisions which illustrate the high threshold for successfully demonstrating a breach of natural justice.

In *Platform Interior Solutions Ltd v ISG Construction Ltd*,[74] ISG sought to resist enforcement on the basis that the adjudicator acted in breach of natural justice because it valued and ordered the payment of a net sum due to Platform, which ISG argued was not a result permitted by the contractual provisions nor a result contended for by either party.

ISG contended that clause 27(5) of the contract provided for the valuation of any loss incurred by ISG as a result of the termination, but it did not provide for Platform to become entitled to any saving that ISG achieved by the termination of the contract, such that the adjudicator had gone on a frolic of her own. Deputy High Court Judge Roger ter Haar QC held that the adjudicator has carefully considered the parties' cases and acted properly in the circumstances:

> "61. In this case the parties were agreed on the way in which the adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the subcontract. The problem appears to me to be that the result of that approach produced a result which I suspect neither party had expected and which gives rise to the legal issues raised in the Part 8 proceedings as to the proper approach on her conclusions as to valuation.

69 Ibid, at paras 51 and 52.
70 Ibid, at paras 55 to 57.
71 Ibid, at paras 59 to 61.
72 See *Amec Civil Engineering Ltd v The Secretary of State for Transport* [2004] EWHC 2339 (TCC), at para 68.
73 See *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358; [2006] BLR 15, at para 87.
74 [2020] EWHC 945 (TCC); (2020) CILL 4461.

> ...
>
> 64. In any event, ... as held by Fraser J in *AECOM*[75] the adjudicator was 'entitled to decide a point of importance on the basis of the material before her, and on a basis for which neither party had contended'."[76]

For essentially the same reasons, the judge further held that the adjudicator had given clear and adequate reasons for her decision.[77] It is worth pointing out that ISG's Part 8 claim for declarations as to the inconsistency of the adjudicator's findings with the contractual provisions was considered at a separate hearing, but the judge refused ISG's application because the issues raised went beyond a short point of construction and were in any event not beyond any rational justification,[78] such that there was no basis for using a Part 8 claim to prevent the timely enforcement of an adjudication decision.[79]

A similar approach was taken by the court in *Flexidig Ltd v M&M Contractors (Europe) Ltd*,[80] which arose from an adjudication commenced by Flexidig to obtain payment of a notified sum of £673,374 plus VAT (or such other sums as the adjudicator found were due from M&M) based on the alleged absence of a valid pay less notice. The adjudicator found that there was a valid pay less notice, but based on the limited materials before him, he concluded that M&M was only entitled to set off a sum of £462,000 for defects (as determined in a previous adjudication), such that a net balance of £223,000 was awarded to Flexidig.

M&M contended at the enforcement hearing that (amongst other things) the adjudicator acted in breach of natural justice, which was robustly rejected by Waksman J. He held that the adjudicator was entitled to award a net balance to Flexidig which was somewhere in between the respective figures contended by the two parties, and he was not obliged to go back and consult the parties before reaching his decision.[81]

Importantly, as in the *ISG* case, Waksman J cited previous case law and reiterated that the adjudicator was entitled to decide a point of importance based on the materials before him, as long as both parties were aware of the materials which gave rise to the issue. Indeed, on the facts of this case, the adjudicator canvassed the issue about the extent of the defects claim in an exchange of emails and the issue was actually on the parties' radar.[82]

These recent cases are a cautionary tale for parties seeking to criticise an adjudicator for dealing with an issue in a way which has not been specifically argued by either party – if the parties are aware of the relevant materials relied on by the adjudicator, and the parties omit to deal with the possible consequences which may flow from those materials, it would be a tall order to later resist enforcement on the basis that the adjudicator should have consulted with the parties before reaching a certain conclusion. It is very rare indeed for a court to find that there has been a material breach of natural justice in such circumstances.

75 *AECOM Design Build Ltd v Staptina Engineering Services Ltd* [2017] EWHC 723 (TCC); [2017] BLR 329.
76 Ibid, at paras 61 and 64.
77 Ibid, at paras 66 and 67.
78 See the limited exceptions laid down in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] BLR 344, at paras 17 and 18.
79 *ISG Construction Ltd v Platform Interior Solutions Ltd* [2020] EWHC 1120 (TCC); [2020] BLR 525.
80 [2020] EWHC 847 (TCC).
81 Ibid, at para 96.
82 Ibid, at para 97.

Fraud

Unlike issues of natural justice, allegations of fraud are raised much less frequently at enforcement hearings, but there has been a string of interesting cases recently such as *Gosvenor London Ltd v Aygun Aluminium UK Ltd*[83] in 2018 and *PBS Energo AS v Bester Generacion UK Ltd*[84] in 2019, which provide interesting case studies for the types of situation which might give rise to a ground for successfully resisting enforcement.

In relation to the *PBS* case, readers will recall from last year's review that there was a pending appeal, and in March 2020, the judgment in *PBS Energo AS v Bester Generacion UK Ltd*[85] was finally handed down by the Court of Appeal. At first instance, Pepperall J refused to enforce an adjudication decision in PBS' favour on the ground that the adjudicator's decision had arguably been procured by fraud – the adjudicator concluded that Bester had to pay for items of plant allegedly stored at PBS' factories, but it turned out that PBS' evidence was false and certain large items of plant had already been sold to third parties. The Court of Appeal affirmed Pepperall J's decision.

Coulson LJ started by reviewing the case law on allegations of fraud in enforcement proceedings, and he identified three key principles:[86]

> "(a) If the allegations of fraud were made in the adjudication then they were considered (or will be deemed to have been considered) by the adjudicator in reaching his decision, and cannot subsequently amount to a reason not to enforce the decision: see *SG South*,[87] *GPS Marine*,[88] and *Speymill*.[89]
>
> (b) The same principle applies if the allegations of fraud were not made in the adjudication but could and should have been made there: see *Gosvenor*.
>
> (c) If the adjudicator's decision was arguably procured by fraud (such as in *Eurocom*[90]) or where the evidence on which the adjudicator relied is shown to be both material and arguably fraudulent (as here) then, on the assumption that the allegations of fraud could not have been raised in the adjudication itself, such allegations can be a proper ground for resisting enforcement."

The Court of Appeal refused permission to appeal for some of the grounds (namely the contentions that the fraud was not relevant to the adjudicator's decision and that the allegations of fraud could have been raised in the adjudication) and did not consider it appropriate to reopen Pepperall J's findings of fact. It is noteworthy that PBS did not actually challenge Bester's evidence on fraud at the enforcement hearing, and in any event, the documents relied on by Bester were only disclosed during the TCC proceedings.[91]

Therefore, the key issue which had to be determined by the Court of Appeal was the procedural issue as to whether the allegations of fraud should have been pleaded prior to the enforcement hearing, and this is a significant practice point for future reference. The courts have clearly considered allegations of fraud in previous enforcement proceedings without requiring pleadings, and this was a novel point which had not been raised on previous occasions.

> It is always important for a party relying on allegations of fraud to raise them as soon as practicable, and this would usually mean proper evidence in the defendant's responsive witness statement and detailed submissions in the skeleton arguments exchanged before the hearing

In the end, Coulson LJ observed that a claimant which chooses to enforce an adjudication decision using the TCC's accelerated procedure effectively accepts the residual risk that something may arise on enforcement which had not arisen in the adjudication. In any event, CPR r24.4(2) does not require a defendant to provide a pleaded defence prior to the hearing of the summary judgment application, and the same applies to allegations of fraud which are relied on to resist enforcement.[92]

83 [2018] EWHC 227 (TCC); [2018] BLR 353.
84 [2019] EWHC 996 (TCC); [2019] BLR 350.
85 [2020] EWCA Civ 404; [2020] BLR 355.
86 Ibid, at para 23.
87 *SG South Ltd v Kingshead Cirencester LLP and Another* [2009] EWHC 2645 (TCC); [2010] BLR 47.
88 *GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd* [2010] EWHC 283 (TCC); [2010] BLR 377.
89 *Speymill Contracts Ltd v Baskind* [2010] EWCA Civ 120; [2010] BLR 257.
90 *Eurocom Ltd v Siemens plc* [2014] EWHC 3710 (TCC); [2015] BLR 1.
91 Ibid, at paras 25 to 27.
92 Ibid, at paras 35 to 37.

The latest decision in *PBS* is a helpful summary of the principles governing allegations of fraud in enforcement proceedings, and although there is still a high threshold for demonstrating false representations which could not have been identified or challenged during an adjudication, it is clear that the court is not prepared to allow a fraudulent party to avoid the consequences of its conduct by relying on a technical pleading point at an enforcement hearing.

Nevertheless, it is always important for a party relying on allegations of fraud to raise them as soon as practicable, and this would usually mean proper evidence in the defendant's responsive witness statement and detailed submissions in the skeleton arguments exchanged before the hearing (as Bester had done in *PBS*).[93] The court will always be keen to ensure that all parties are given a fair and proper opportunity to consider and address those allegations, and will most likely take a dim view of any attempt to ambush another party at an enforcement hearing – especially when it comes to serious allegations involving fraud and dishonesty.

[93] Ibid, at para 38.

INSOLVENCY

Insolvency in the construction industry has been a topical issue since the collapse of Carillion in 2018, and the Covid-19 pandemic has thrown the issue into even sharper relief as employers and contractors alike face heightened challenges in terms of funding and cash flow. The past year has seen the passage of the Corporate Insolvency and Governance Act 2020 (the 2020 Act) and a proliferation of case law on the enforcement of adjudication decisions in favour of an insolvent party, and these will be considered in turn below.

Corporate Insolvency and Governance Act

The 2020 Act is one of the most important pieces of insolvency legislation in recent years. The most immediate effect of the 2020 Act was to introduce a temporary prohibition on presenting winding-up petitions on the basis of statutory demands served in the relevant period between 1 March and 30 September 2020 (this has been extended until 31 March 2021 at the time of writing), as well as restrictions on winding-up petitions based on a company's inability to pay its debts[94] unless the creditor has reasonable grounds for believing that Covid-19 has not had an impact on the company, or the same facts would have arisen irrespectively.[95]

[94] Section 123 of the Insolvency Act 1986.
[95] Schedule 10 to the 2020 Act.

Importantly, the 2020 Act also contains various new provisions which were not specifically directed at Covid-19, including the introduction of a 20-day moratorium (which can be extended) and also a new court-sanctioned restructuring plan process (in the form of a new Part A1 of the Insolvency Act 1986 and a new Part 26A of the Companies Act 2006, respectively), which can be implemented if a company is financially distressed but can still be rescued as a going concern.

> In light of the new statutory regime, it is advisable for parties to existing building and engineering contracts to review the provisions as currently drafted and consider whether any of their insolvency-triggered rights may be affected by the 2020 Act

These new options may be particularly beneficial to financially distressed companies in the construction and infrastructure industry, as a moratorium or restructuring plan may keep a project going and provide an opportunity for a financially distressed contractor to trade its way out of its financial difficulties, thus potentially avoiding the upheaval of a sudden insolvency event and termination of a main contractor. Although this will not be possible in every case, the availability of these new options is to be welcomed, and in the age of the pandemic, there is a lot to be said for parties trying to cooperate in good faith and find a mutually beneficial arrangement in the event of significant financial hardship.

Also of relevance to the construction industry is s14 of the 2020 Act, which inserts a new s233A into the Insolvency Act 1986. This new section imposes a statutory freeze on any provision in a contract for the supply of goods and/or services which provides that the contract or the supply would terminate (or that any other thing would take place) in the event of the receiving company's insolvency. This applies to insolvency procedures commenced after 26 June 2020, even if the relevant contracts were entered into before this date.

This means that contractual rights of termination in building and engineering contracts and other subcontracts/purchase orders in the supply chain triggered by an employer/purchaser's insolvency may now be unenforceable, unless the contractor/supplier in question falls within one of the exclusions (for example, the temporary exclusion due to the Covid-19 pandemic for "small suppliers" as defined in s15 of the 2020 Act, which has been extended until 30 March 2021).

Further, the new s233A(4) of the Insolvency Act 1986 imposes a statutory freeze on termination based on an event occurring before the start of the insolvency period, such that it will no longer be possible to terminate for historic defaults before an employer/purchaser's insolvency – this does not preclude termination based on events occurring after the start of the relevant insolvency period.

The above provisions on contractual termination constitute a default position, but termination remains possible where the employer/purchaser (or its receiver/administrator/liquidator) consents to the termination, or where the court grants permission because the continuation of the contract would cause hardship. This is expressly provided by the new s233B(5) of the Insolvency Act 1986. Again, it is clear that the 2020 Act places its emphasis on parties cooperating and reaching an arrangement which is mutually satisfactory and beneficial.

In light of the new statutory regime, it is advisable for parties to existing building and engineering contracts to review the provisions as currently drafted and consider whether any of their insolvency-triggered rights may be affected by the 2020 Act. Parties currently negotiating new contracts should also revisit and review their draft termination provisions so that they take full account of the effect of the 2020 Act. In all cases, there is no substitute for maintaining a healthy dialogue between the parties, so that any financial issues and risks can be appropriately dealt with while there is still room for discussion and agreement.

Insolvency and adjudication

Readers will no doubt be familiar with the Court of Appeal's decision in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*[96] in January 2019, which was covered in some detail in last year's review. In June 2020, the Supreme Court delivered its judgment in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd*,[97] which substantially affirmed the Court of Appeal's reasoning on jurisdiction but differed in its conclusion on the issue of futility. This represents the final word on the right of insolvent companies (and their liquidators or administrators) to commence adjudications, leaving the issue of enforcement to be dealt with by the TCC on a case-by-case basis.

Lord Briggs started by observing that the identification of the net balance is often a question of calculating the difference between the aggregate of the claims and the aggregate of the cross-claims, but if any of the claims and cross-claims are in dispute, then those disputes will need first to be resolved, by reference to the individual merits of each.[98] To this end, Lord Briggs noted that "… liquidators are no strangers to ADR, or to the pursuit of the most cost-effective and proportionate means of resolution of disputes … The court has expressly approved the inclusion of third-party determination procedures similar to adjudication in insolvency schemes of arrangement".[99]

On the issue of the adjudicator's jurisdiction, Lord Briggs noted that a liquidator is not compelled to refer all claims/cross-claims (ie multiple disputes) to an adjudication, but can "… untangle a complex web of disputed issues arising from mutual dealings between the company and a third party by picking some as suitable for adjudication, others for arbitration and others for disposal by an application to the court for directions, or by ordinary action".[100] If a cross-claim is relied on as a defence, then that arguably forms part of the single dispute which the adjudicator has to decide in the usual course even if it arises under another contract.[101]

As to the contention that the mandatory insolvency set-off extinguishes and substitutes the underlying cross-claims, Lord Briggs provided some helpful clarification on the meaning and effect of previous House of Lords authorities (a matter which was left somewhat unclear in the Court of Appeal):

> "… the submission assumes, from an over-literal reading of the language of Lord Hoffmann's speech in *Stein v Blake*,[102] that the claims and cross-claims which fall within insolvency set-off lose their separate identity for all purposes, on the cut-off date. It is true that they do for the purpose of assignment, but there are important examples of purposes where they do not. …"[103]

Lord Briggs then went on to reject the argument that an adjudication involving an insolvent party would be futile, parting company with the observations in Coulson LJ's judgment. Lord Briggs pointed out that construction adjudication as a mainstream method of ADR is "… an end in its own right, even where summary enforcement may be inappropriate or for some reason unavailable", especially since the adjudication process is very similar to the process of proof of a debt conducted by a liquidator.[104] Above all, insolvent parties will welcome the fact that the Supreme Court has now recognised the possibility of enforcing an adjudication decision in the context of insolvency:

> "65. Furthermore it will not be in every case that summary enforcement will be inappropriate. 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. …
>
> …
>
> 67. The proper answer to all these issues about enforcement is that they can be dealt with, as Chadwick LJ suggested, at the enforcement stage, if there is one. In many cases the liquidator will not seek to enforce the adjudicator's decision summarily. In others the liquidator may offer appropriate undertakings, such as to ring-fence any enforcement proceeds: see the discussion of undertakings in the *Meadowside* case. Where there remains a real risk that the summary enforcement

96 [2019] EWCA Civ 27; [2019] BLR Plus 20.
97 [2020] UKSC 25; [2020] BLR 497.
98 Ibid, at para 30.
99 Ibid, at para 34.
100 Ibid, at para 46.
101 Ibid, at paras 44 and 63.
102 *Stein v Blake* [1996] 1 AC 243.
103 Ibid, at para 50.
104 Ibid, at paras 60 and 61.

> of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment."[105]

The key message from the Supreme Court is that adjudication is, by and large, a convenient and cost-effective way of dealing with disputed claims (and/or cross-claims) arising from construction contracts, and this method of dispute resolution can be helpful and conducive to the process of insolvency set-off. In most cases, parties are likely to abide by the adjudication decision without any need for enforcement (just as they would comply with the liquidator's decision on the proof of a debt).

In light of the economic impact of Covid-19 and the increasing incidence of insolvency in the construction industry, the option of adjudication for the resolution of technical disputes as part of an insolvency process should be welcomed, and it also helps ease the burden on the court dockets which are already under enormous strain. One can expect a growing body of case law on the factors which are relevant to the enforcement of adjudication decisions in favour of an insolvent party, and that trend has already begun over the past year.

Following on from last year's decision in *Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd*[106] (which laid down a number of conditions for enforcing an adjudication decision in favour of an insolvent party, as explained in last year's review), the TCC has now had the opportunity to consider and apply those principles in a number of other cases.

In *Balfour Beatty Civil Engineering Ltd and Another v Astec Projects Ltd (in liquidation)*,[107] which pre-dated the Supreme Court's decision in *Bresco*, the TCC was asked to restrain three concurrent adjudications from taking place to deal with the parties' cross-claims arising from separate contracts relating to Blackfriars Station. There may be very good reasons for embarking on separate adjudications in this manner if the issues are too complex, or if the solvent party wishes to obtain a positive award and not just rely on a defence of set-off – all this assumes that the cross-claims arise from construction contracts rather than other types of legal liability.

In any event, in *Balfour Beatty*, Waksman J had no difficulty concluding that a court would be prepared to net off the results in the three adjudications against each other in order to arrive at a complete and comprehensive account of the parties' mutual dealings,[108] and since the three adjudication decisions exhaustively considered all claims and cross-claims between the parties, the primary condition in *Meadowside* would be satisfied.[109] There was simply no basis for injuncting these adjudications in light of the *Bresco* decisions.

As for the security required for continuing with the adjudications, Waksman J concluded that it would be sufficient for Astec to offer security for the costs of any subsequent litigation to determine the three contractual disputes, and although some concerns were raised about the terms of the after-the-event (ATE) legal expenses insurance, they were resolved by the ring-fencing of the sum awarded which would be returned upon the termination of the insurance policy. In addition, the court imposed an immediate stay on enforcement, provided that Balfour Beatty commenced litigation within six months of the adjudicator's decision.[110]

Another success story for the enforcement of an adjudication decision in favour of an insolvent party can be found in *Styles Wood Ltd v GE CIF Trustees*.[111] The main issue in this case was the adequacy of Styles' ATE insurance policy, which GE sought to criticise on the basis of a purported estimate of the costs of re-running the dispute in a subsequent arbitration.

HHJ Parfitt rejected the argument due to the lack of any breakdown or explanation of the estimated costs (which were no more than a finger-in-the-air figure asserted by GE's solicitors),[112] and he took into account the fact that the bulk of the factual and expert evidence prepared for the adjudication could be reused and would lead to significant cost savings in a subsequent arbitration, especially since the issues in dispute were not particularly complex.[113]

The judge further held that the ring-fencing of the adjudication sum should extend to any appeal against the arbitration award, and that the parties are at liberty to come back to court to ask for further security in respect of any subsequent arbitration and/or appeal if necessary.[114] This is a helpful illustration of the granular details which the court will evaluate when assessing the

105 Ibid, at paras 65 to 67.
106 [2019] EWHC 2651 (TCC); [2020] BLR 65.
107 [2020] EWHC 796 (TCC); (2020) 37 BLM 06 8.
108 Ibid, at paras 11 to 19.
109 *Meadowside*, at para 87(1).
110 *Balfour Beatty*, at paras 22 to 31.
111 [2020] EWHC 2694 (TCC).
112 Ibid, at paras 24 to 27.
113 Ibid, at paras 15 to 23.
114 Ibid, at paras 30 to 33.

adequacy of the security provided by an insolvent party for the purpose of enforcing an adjudication decision. It is clear that there is no necessary presumption against enforcement, and a defendant should be prepared to provide concrete evidence (including cost estimates akin to a Precedent H costs budget) in order to make good any argument that the security offered is insufficient.

The above can be contrasted with Fraser J's decision in *John Doyle Construction Ltd v Erith Contractors Ltd*,[115] which refused to grant summary judgment after a detailed consideration of the principles laid down in the *Meadowside* and *Bresco* decisions. This case arose from a final account adjudication relating to landscape works at the Olympic Park for the London 2012 Olympic Games, and John Doyle was the insolvent party with the benefit of third-party funding (Henderson Jones).

In his preliminary observations, Fraser J placed particular emphasis on the need for the adjudicator's decision to deal with all of the parties' mutual dealings, and he posited three questions which the court should always consider (in addition to the issue of security): (i) whether the dispute decided by the adjudicator is in respect of the whole of the parties' financial dealings under the construction contract in question; (ii) whether there are mutual dealings between the parties that are outside the construction contract in question; and (iii) whether there are other defences available to the defendant that were not deployed in the adjudication.[116]

On the facts, Fraser J considered that "[w]here, as here, the dispute referred was the valuation of the referring party's final account, summary judgment will potentially be available (dependent upon the other considerations below)",[117] although he noted that this type of adjudication is not entirely usual. It is worth pointing out that the adjudicator in this case also took into account (and dismissed) a cross-claim relied on by Erith based on a separate contract, and this set-off did not have to be considered by the court on the summary judgment application.[118]

Turning to the issue of security, Fraser J observed that the court's primary concern is the potential repayment of the sum that would be actually paid out on summary judgment for enforcement of the adjudicator's decision,[119] and the recovery of costs in any subsequent litigation is only a secondary concern. In this regard, it was crucial that the liquidators of John Doyle did not offer any undertakings at all, and there was no ring-fencing or security in respect of the adjudication sum – all that was available was an ATE insurance policy and a purported letter of credit through the funders, Henderson Jones.[120]

> It is important not to overstate the implications of the *John Doyle* decision, as Fraser J's detailed judgment was ultimately based on an application of the principles established in *Bresco* and *Meadowside* to the particular facts of that case

Upon closer analysis, Fraser J concluded that no letter of credit was in fact available, as John Doyle has provided no more than a letter of intent from Henderson Jones' bankers, and no security was actually in place until Henderson Jones made a formal application to its bank for a letter of credit, which it undertook to do upon receiving the adjudication sum in its account – this was held to be a "circular" and "strange" way of providing security which cannot be equated to a sufficient safeguard.[121] It is plain that the burden is on the insolvent company to offer adequate security, and where the security is conditional or speculative, the court will not be willing to expose the other party to inordinate risks.

Finally, on the ATE insurance policy relied on by John Doyle, Fraser J followed the guidance laid down by the Court of Appeal in *Premier Motorauctions Ltd and Another v PricewaterhouseCoopers LLP and Another*[122] (in the context of applications for security for costs), and given that the terms of the insurance allowed total avoidance of the policy if a material fair presentation was not made (which had a real prospect of occurring), the ATE insurance was not considered to be sufficient.[123] On the whole, there was a real risk that the summary enforcement of this adjudication decision would deprive Erith of its right to have recourse to the company's claim as security for its cross-claim, and summary judgment was therefore refused.

115 [2020] EWHC 2451 (TCC); [2020] BLR 671.
116 Ibid, at paras 54 to 56.
117 Ibid, at para 62.
118 Ibid, at para 66.
119 Ibid, at paras 80 and 83.
120 Ibid, at paras 86 to 88.
121 Ibid, at paras 96 to 101.
122 [2017] EWCA Civ 1872; [2018] Lloyd's Rep IR 123.
123 *John Doyle*, at paras 103 to 113.

It is important not to overstate the implications of the *John Doyle* decision, as Fraser J's detailed judgment was ultimately based on an application of the principles established in *Bresco* and *Meadowside* to the particular facts of that case. The inadequate and non-conventional nature of the security proposed by John Doyle proved to be fatal to the summary judgment application, and this should be contrasted with the various other cases where sufficient security was offered. As Fraser J emphasised:

> "... it is clearly in the public interest that liquidators should be able to pursue and enforce debts owed to companies in liquidation in a cost-effective manner. There are also a variety of different methods and models available for them to do so. This judgment should not be taken in any respect as disapproval of these types of arrangement generally. It is also important to remember that simply because one party to a construction contract is in liquidation, this does not entitle the other party to that contract to a windfall. ... If adequate undertakings are available from the liquidator, or other suitable security sufficient to achieve the same purpose, then summary judgment (based on the principles I have identified above) would be available, if the 'real risk' referred to by Lord Briggs was thereby avoided."[124]

The parting comments in the *John Doyle* decision are worth highlighting for insolvent companies and liquidators intending to refer historic disputes to an adjudication after some months/years have elapsed. Fraser J indicated that the TCC may not be prepared to order the usual expedited timetable for the enforcement of such an adjudication decision, as the defendant may require more time to prepare its evidence and meet the claim fairly.[125] This factor will have to be weighed in the balance together with the other risks associated with enforcement, especially where the debtor is unlikely to comply with the decision and the speediness of enforcement is of the essence.

INTERPRETATION OF CONTRACTS

Assignment of subcontracts

As outlined above, the Energy Works Hull project for the construction of a waste-to-energy plant has featured in a number of interesting TCC decisions in 2020, and one of the most widely discussed is *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others*,[126] which determined two preliminary issues in an ongoing dispute between the employer, Energy Works (Hull) Ltd (EWHL), and MW, the engineering, procurement and construction (EPC) contractor, arising from the termination of the EPC contract. The main trial has been listed in June 2021, and EWHL's claim against MW is for damages for delay, defects and additional costs of completion in an estimated sum of approximately £133 million.

The first of the two preliminary issues concerned the legal effect of the assignment by MW to EWHL of MW's subcontract with its sub-contractor (Outotec), upon EWHL's request under clause 44.3(d) of the EPC contract after the termination of MW's employment. This turned on a consideration of the principles of assignment/novation and a question of contractual interpretation – what does the use of the words "assign any subcontract" mean?

This author appeared as junior counsel for EWHL at the two-day hearing, which was conducted remotely. MW's primary argument was that the assignment only transferred the right to the future performance of Outotec's subcontract but not the accrued rights and causes of action. As an alternative case (which was introduced as an amended pleading after the preliminary issues hearing was ordered), MW sought to argue that the assignment transferred both the benefit and the burden of Outotec's subcontract and was effectively a novation. Both of these contended interpretations of the assignment clause were rejected by the court.

O'Farrell J held that the starting point was to construe the words in the EPC contract, and as Lord Browne-Wilkinson observed in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and Others*,[127] the natural and ordinary meaning of the words "assign any subcontract" is the assignment of MW's entire benefit under the Outotec subcontract (ie both future rights and accrued rights).

124 Ibid, at para 140.
125 Ibid, at paras 146 and 147.
126 [2020] EWHC 2537 (TCC); [2020] BLR 747.
127 [1994] 1 AC 85; (1993) 63 BLR 1.

Importantly, there was no indication in the parties' correspondence to suggest that they had a different understanding of those words or that they intended to separate future and accrued rights.[128]

The court was clearly reluctant to ignore the ordinary meaning of the words used, especially where the parties could have expressly limited the assignment to future rights but consciously chose not to do so.[129] Given that the contractual language militates against MW's case, it is unsurprising that MW relied heavily on commercial common sense in order to try and persuade the court that the parties intended something different.

O'Farrell J observed that "... the commercial purpose of assignment of the Subcontract is to allow EWHL to enforce those subcontract rights against Outotec to mitigate its losses by seeking rectification of the works, specific performance of particular obligations or compensation",[130] and MW had voluntarily taken the risk of abandoning its right under the subcontract to pass down its liability to Outotec:

> "... it is a matter for the parties to determine the basis on which they allocate risk within the contractual matrix. It is not for the court to re-write the contractual arrangements entered into by the parties or to impose what it considers would be an equitable and fair commercial bargain by reference to the events that have unfolded."[131]

Although MW raised various potential difficulties and queried which party retained the right to instruct additional works and terminate the subcontract, the court was not persuaded that these were insurmountable or would justify re-writing the contract, especially since MW could have avoided these difficulties simply by terminating the subcontract for convenience (which was a power retained by MW as EWHL was not a party to the subcontract despite the assignment).[132]

As for whether the assignment clause actually contemplated a novation of both the benefit and the burden of the subcontract, O'Farrell J noted that "[n]ovation and assignment are very different legal concepts and it must be assumed that the parties meant what they said in referring to assignment rather than novation".[133] This was firmly based on established principles and previous authorities, as the court has emphasised on numerous occasions that an assignment consists of a transfer of rights without requiring the consent of the debtor, whereas a novation involves the creation of a new contract requiring the consent of all three parties involved.

While it was possible in theory for EWHL, MW and Outotec to give advance consent to a novation, that would require a standing agreement on the terms of the new novated contract, but no such agreed terms could be found in the EPC contract or the Outotec subcontract – rather, Outotec's collateral warranty in favour of EWHL provided the option of negotiating the terms of a new contract in the event of MW's termination.[134] Lastly, O'Farrell J considered that the principle of conditional benefit (which was raised by MW as an afterthought in supplemental written submissions) did not assist MW at all, as the operation of the principle would not be in the nature of a novation.[135]

The *Energy Works* decision is a cautionary tale for parties seeking to rely on commercial common sense to rewrite a contract and escape a bad bargain – it reiterates the primacy of the natural and ordinary meaning of the contractual language as emphasised by Lord Neuberger in *Arnold v Britton*,[136] and rejects a plain attempt to invoke commercial common sense retrospectively. In

128 *Energy Works*, at paras 67 and 68.
129 Ibid, at paras 70 to 72.
130 Ibid, at para 75.
131 Ibid, at para 77.
132 Ibid, at para 78 to 83.
133 Ibid, at para 100.
134 Ibid, at paras 102 to 106.
135 Ibid, at para 107.
136 [2015] UKSC 36; (2015) 32 BLM 07 6 , at paras 17 to 21.

this particular case, MW faced an uphill struggle given that its interpretation of the EPC contract contradicted the position previously stated in its own correspondence.

Given that post-termination assignment clauses are common to many standard form building and engineering contracts, the industry will welcome the reassurance provided by O'Farrell J's decision, even though each case will ultimately turn on the precise wording of the contract. For legal practitioners and academics, this is a helpful restatement of the orthodox distinction between assignment and novation – while they are not strictly terms of art, their meaning and effect are well-established and understood, and parties should bear this in mind when drafting assignment and novation clauses in the future.

Limitation of liability

Clauses which limit or exclude liability often prove to be controversial, with parties tending to advance competing interpretations which are most favourable to their respective positions. This is not helped by the fact that many clauses are drafted in broad and somewhat ambiguous language which can be open to different interpretations, sometimes deliberately as a compromise during pre-contractual negotiations. These nuances and ambiguities will come to bear when a dispute arises between the parties and the extent of a party's liability for its defaults becomes at stake.

One species of exclusion clauses which has attracted more debate than others is the exclusion of consequential loss or damage. Historically, the courts have tended to construe the phrase "indirect or consequential loss" as a distinct reference to losses falling under the second limb of the *Hadley v Baxendale*[137] test, namely losses which are not a direct and natural result of the breach in the ordinary course of events.[138]

However, in more recent times, the House of Lords has expressed reservations about the correctness of this position[139] and in *Star Polaris LLC v HHIC-PHIL Inc*,[140] for instance, Sir Jeremy Cooke concluded that the words "consequential or special losses, damages or expenses" in the contract in question did not mean losses under the second limb of the *Hadley v Baxendale* test but had the wider meaning of financial losses caused by guaranteed defects. This demonstrates that the true and proper interpretation does vary depending on the contractual language and context.

The interpretation of "indirect or consequential loss or damage" was most recently considered by the TCC in *2 Entertain Video Ltd and Others v Sony DADC Europe Ltd*,[141] which concerned a claim for loss of profits, business interruption costs and increased cost of working as a result of a fire in a warehouse during the London riots in 2011, which destroyed the stock (with a sales value of approximately £40 million) stored in the warehouse at the time.

Similar to the approach in the *Energy Works* decision, O'Farrell J reiterated the basic principles of interpretation summarised by the Supreme Court in *Arnold v Britton*, and adopted the natural and ordinary meaning of the clause as a starting point.[142] On this basis, it appeared at first sight that the lost profits and business interruption losses were a direct and natural result of the fire which destroyed the warehouse, such that they did not fall within the scope of the exclusion clause.

The complication, however, lay in the drafting of the clause, which expressly referred to indirect or consequential losses "... including (to the extent only that such are indirect or consequential loss or damage only) but not limited to loss of profits, loss of sales, loss of revenue, damage to reputation, loss or waste of management or staff time or interruption of business".

After considering the various authorities which construed similar but differently worded exclusion clauses, O'Farrell J observed that those authorities were broadly consistent with her initial impression of the scope and meaning of the exclusion clause in question.[143] She then went on to reject the defendant's contention that the exclusion clause should be given a wider interpretation to catch the lost profits and business interruption losses claimed:

> "... Contrary to the *Star Polaris* case, clause 10.1 does not attempt to define the extent of Sony's liability for all breaches under the Logistics Contract. Clause 10.1 is limited to liability for loss of, or damage to, the goods. Therefore, it does not assist in ascertaining the true meaning of clause 10.3. Contrary to the

137 *Hadley and Others v Baxendale and Others* [1854] EWHC Exch J70.
138 See eg *Millar's Machinery Co Ltd v David Way and Son* (1935) 40 Com Cas 204; *Croudace Construction Ltd v Cawoods Concrete Products Ltd* (1978) 8 BLR 20; and *Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals and Polymers Ltd and Others* [1999] BLR 41.
139 See eg Lord Hoffmann's observations in *Caledonia North Sea Ltd v British Telecommunications plc and Others* [2002] UKHL 4; [2002] BLR 139, at paras 99 to 100.
140 [2016] EWHC 2941 (Comm).
141 [2020] EWHC 972 (TCC); (2020) 37 BLM 06 4.
142 Ibid, at paras 221 and 222.
143 Ibid, at paras 225 to 232.

Transocean[144] case, there is no definition of indirect or consequential loss in the Logistics Contract that would indicate a wider meaning than the second limb of *Hadley v Baxendale*."[145]

O'Farrell J's conclusion on this issue demonstrates that the wider interpretation of the words "consequential loss" in the few isolated cases such as *Star Polaris* should not be taken as a sea change in the courts' approach or a wholesale rejection of the long line of previous authorities, and that cases such as *Star Polaris* are distinguishable on the basis of the particular wording and context of the contract in question. The starting point is still the second limb of the *Hadley v Baxendale* test, with the caveat that this will be subject to the language used in each contract, and the result may well be very different if a clause refers to loss of profit and the like as distinct heads of loss rather than as a non-exhaustive illustration of types of consequential loss.

In practice, an exclusion of consequential loss is commonly understood by parties and their legal representatives as a reference to the second limb of the *Hadley v Baxendale* test, and on this basis, many contracts incorporate standard wording from templates or previous contracts. The decision in *2 Entertain* therefore provides a degree of reassurance to parties whose contracts contain similarly drafted provisions. However, given that every contract is different, one can expect similar debates to come before the court again, and this is unlikely to be the last word on this subject.

The importance of the contractual matrix and the precise wording of the contract terms to the interpretation of an exclusion/limitation clause cannot be overstated, and this was made abundantly clear in *RSK Environment Ltd v Hexagon Housing Association Ltd*.[146] In this case, RSK commenced Part 8 proceedings and sought a declaration that, insofar as RSK assumed any tortious duty of care in respect of a ground investigation report, the nature, scope and extent of such a duty was circumscribed by the limitation clauses contained in RSK's proposal document.

Although a party's common law duty of care is usually limited by the scope of its contractual duties where there are concurrent duties in tort and in contract (save where there is evidence of an assumption of wider responsibilities), RSK's position was complicated by a live dispute between the parties as to the existence of a contractual relationship. RSK sought to get around this difficulty by contending that the terms of its proposal could determine the scope of its common law duty of care even if there was no contract between the parties.

The problem, however, was that the court did not have any, or adequate, evidence to resolve the dispute as to the contractual matrix, and there was also no evidence that Hexagon received a copy of RSK's proposal and terms and conditions, even though the site investigation report referred to a number of service constraints which in turn referenced the parties' putative contract.[147]

In the circumstances, O'Farrell J refused to grant the Part 8 relief sought by RSK, holding that "[t]he court cannot determine these issues in a vacuum and certainly cannot determine these issues without proper findings as to the existence of any contract between the parties, the terms and conditions of any such contract and the proper construction of such terms".[148] This is a timely reminder of the dependence of questions of interpretation on the contractual matrix, and where the consequence of the contended interpretation is to leave one party without any meaningful remedy, the court will be reluctant to make a finding without any proper evidence to resolve the disputed contractual matrix.

This is especially the case for Part 8 proceedings, which are designed for cases without substantial factual disputes and involving a self-contained point of law. Parties should be careful not to assume that a live dispute on an important factual issue relevant to a question of interpretation can necessarily be circumvented by means of an assumed fact, and this equally applies to the appropriateness of a point of construction for determination as a preliminary issue.

Implied terms of good faith

It is not very often that the TCC is asked to consider the existence and effect of implied terms of good faith, but this arose in the recent decision of *Essex County Council v UBB Waste (Essex) Ltd*,[149] which was a dispute arising from a 25-year private finance initiative (PFI) contract between the local authority and UBB to design, construct, finance, commission, operate and maintain a mechanical biological waste treatment plant in Basildon. The local authority claimed that UBB failed to pass the acceptance

144 *Transocean Drilling UK Ltd v Providence Resources plc* [2016] EWCA Civ 372; [2016] BLR 360.
145 *2 Entertain*, at para 239.
146 [2020] EWHC 2049 (TCC); (2020) 37 BLM 09 7.
147 Ibid, at paras 48 to 50.
148 Ibid, at para 53.
149 [2020] EWHC 1581 (TCC).

tests by the acceptance longstop date, such that it was entitled to terminate the contract and recover damages.

UBB contended that the local authority owed implied duties to cooperate with UBB and exercise any contractual discretion in good faith, including for the purpose of any contractual review procedures and the consideration of proposed changes to the facility and its method statements and performance requirements.

The court approached the question based on the relevant principles on the implication of terms as restated by Lord Neuberger in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Another.*[150] On the alleged implied terms constraining the exercise of a discretion, an implied term that a contractual discretion should be exercised in good faith and not arbitrarily, capriciously or irrationally was described by Pepperall J as "well founded in authority", but he noted that there was no scope for such an implied term where a party is exercising an absolute contractual right, especially a right to terminate a contract.[151]

As for the implication of general terms of good faith and cooperation in relational contracts, Pepperall J referred to the well-known authorities in this regard[152] and concluded that "... this 25-year PFI contract is a paradigm example of a relational contract in which the law implies a duty of good faith".[153] In particular, it is noteworthy that neither the sole-remedy clause nor the entire agreement clause in the PFI contract precluded the implication of terms, and this is well-established in the authorities.[154]

Pepperall J then proceeded to consider whether the local authority had acted arbitrarily, capriciously or irrationally or otherwise failed to act in good faith, noting that this was an objective question of fact as to "... whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people".[155] In the event, even though the court accepted in principle that the PFI contract contained implied terms of good faith, it roundly rejected the allegations of breach.

For instance, on the local authority's insistence that UBB should pass the acceptance test in both "bio-stabilisation mode" and "SRF mode", Pepperall J found that this was expressly required by the contract and that the implied terms could not be set up to frustrate such clear and express contractual provisions.[156] Similarly, when it came to the rejection of modifications which had a potential impact on UBB's ability to pass the critical acceptance tests, these were in the absolute discretion of the local authority and would not have relieved UBB of its obligation to pass the acceptance tests, and the implied terms did not assist UBB at all.[157]

The *UBB* decision confirms the modern approach of the court when it comes to the implication of terms of good faith and cooperation – it is generally accepted that long-term relational contracts such as PFI contracts contain such implied terms, and it is also relatively uncontroversial that contractual discretions should not be exercised arbitrarily, capriciously or irrationally. However, it is worth emphasising that a duty of good faith is unlikely to be implied in most typical building and engineering contracts outside of PFI projects, although the NEC form of contract expressly provides for a duty of mutual trust and cooperation which has been construed in the same way as a duty of good faith.

However, the threshold for establishing a lack of good faith remains very high, especially where a party is seeking to wriggle out of express contractual obligations and requirements. There is still an obvious reluctance on the part of the court to allow implied terms of good faith to turn into a trojan horse for rewriting the express rights and obligations undertaken by the parties to a contract. The court is also sceptical of any attempt by a party to water down its express contractual obligation under the guise of an alleged breach of good faith. This is unsurprising, as it is trite that an implied term cannot be inconsistent with the express terms of the contract.

In every case, the court will be seeking to strike a balance between the freedom of contract and legal certainty on the one hand, and the need to intervene in exceptional cases where there is commercially unacceptable conduct on the other. What is plain is that an implied duty of good faith is not a panacea for a party that wishes to modify the contractual bargain but does not get its way.

150 [2015] UKSC 72; (2016) CILL 3779.
151 *Essex*, at paras 96 and 97.
152 See eg *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep 526, *Mid Essex Hospital Services NHS Trust v Compass Group UK & Ireland Ltd* [2013] EWCA Civ 200; [2013] BLR 265 and *Bates and Others v Post Office Ltd (No 3)* [2019] EWHC 606 (QB).
153 *UBB*, at paras 99 to 106 and 112 to 113.
154 Ibid, at paras 107 to 111.
155 Ibid, at paras 114 to 116.
156 Ibid, at paras 141 to 148.
157 Ibid, at para 271.

Contractual obligations as to design life

The interpretation of obligations as to fitness for purpose and design life captured the headlines a few years ago when the case of *MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd and Another* reached the Supreme Court.[158] The year 2020 has now provided us with another important case study in *Blackpool Borough Council v VolkerFitzpatrick Ltd and Others*,[159] which related to the construction of a new tram depot in Blackpool.

The local authority contended that the tram depot suffered from numerous corrosion defects with an estimated remedial cost of over £6 million, as the depot as designed and constructed was unsuitable for the exposed coastal marine environment and did not meet the intended design life of 50 years. VolkerFitzpatrick disputed the claim on the basis that (amongst other things) the required design life was 25 years for the wall cladding panels, and 20 years for the cold-formed components, roof steel components and other components in issue. This therefore gave rise to an interesting question of contractual interpretation.

HHJ Stephen Davies began by citing O'Farrell J's decision in *2 Entertain* and her recitation of the Supreme Court's guidance in *Arnold v Britton.*[160] The dispute involved a classic scenario of an undefined term which gave rise to competing interpretations. The local authority contended that the term "building structure" referred to all the components being complained of, whereas VolkerFitzpatrick argued that as a matter of its ordinary meaning and the other relevant terms of the contract documents as a whole, the term was in fact limited to the primary structural frame as made from hot-rolled steel (ie the columns, rafters and cross-bracing).[161]

The judge found that the various industry guidance, works information and the functional procurement specification relied on by the parties did not provide any conclusive support to either party's position, except the RPS design log which formed the primary basis of his conclusions – in particular, he considered that the request for clarification as to the "lifespan of the building" had any necessary bearing on the definition of "building structure" or the design life of the specific components in question.[162]

In the end, HHJ Davies considered that item 1.9 of the RPS design log headed "minimum design life" provided the clearest guidance and made a distinction between the required design life of the "structural frame" (with a design life of 50 years) and the "external shell" (with a design life of 25 years) respectively. Although the RPS design log did not purport to contain contractual definitions and was revised post-contract, it was nonetheless a contract document and represented an attempt to resolve an ambiguity in relation to the minimum design life.[163] He further concluded that the "external shell" must include both the wall cladding panels, the external aluminium roof trays and each and every separate component forming part of the roof, as the phrase would otherwise be deprived of any sensible meaning or effect.[164]

> What is plain is that an implied duty of good faith is not a panacea for a party that wishes to modify the contractual bargain but does not get its way

As for the cold-formed components (ie the purlins, cladding rails and connecting brackets), although it was true that they were secondary structural elements which transmitted substantial loads, HHJ Davies found that they were also subject to a design life of 25 years only as they did not form part of the structural frame. Specifically, the judge took into account the other relevant sections of the RPS design log, which specified an environmental classification and a minimum thickness of galvanised coating for the purlins and cladding rails which were different from that of the structural steel forming part of the superstructure.[165] In reaching this conclusion, it is noteworthy that HHJ Davies checked his interpretation against other provisions for consistency.

It is clear from the court's detailed reasoning on this deceptively simple point of construction that the issue was finely balanced because there were various competing factors in the contract documents which pulled in different directions, and the parties/drafters simply did not give very much thought to this issue at the time of contract. Unlike the *MT Højgaard* case (where there were competing

158 [2017] UKSC 59; [2017] BLR 477.
159 [2020] EWHC 1523 (TCC).
160 Ibid, at para 203.
161 Ibid, at paras 201 and 202.
162 Ibid, at paras 210 to 214.
163 Ibid, at paras 219 to 223.
164 Ibid, at paras 215 and 216.
165 Ibid, at paras 225 to 229.

standards applicable to the foundations and the higher standard was applied), the court in *Blackpool* decided to apply a lower standard because the higher standard was linked to a specific part of the works which turned out to be distinguishable from the components in question.

It bears emphasis that the court in *Blackpool* based its decision strictly on the contractual documents rather than generic industry guidance and structural engineering expert evidence on the meaning of a "building structure", given that the parties were unlikely to have had such detailed technical considerations in mind at the time of contract.[166] This highlights the central importance of the contract documents to questions of interpretation, and the limited assistance of opinion evidence with the benefit of hindsight. Needless to say, parties can avoid similar disputes in the future by ensuring that key specifications relating to fitness for purpose and design life are clearly drafted and that all relevant terms are properly defined.

Interpretation of performance bonds

The proper interpretation of on-demand bonds and performance bonds and the requisite conditions for making a valid call on a bond is another perennial issue which arises in construction disputes, although it is not very often that it comes before the TCC for determination, the last occasion being *Ziggurat (Claremont Place) LLP v CC International Insurance Company plc*.[167] It was therefore particularly exciting to see Fraser J's decision in *Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd and Another*,[168] which concerned an injunction against Multiplex's attempt to call on a performance bond (very similar to an Association of British Insurers (ABI) model form of guarantee bond) based on its claim for liquidated damages, at a time when an adjudication on the final account was still ongoing.

One of the questions before the court was whether Multiplex was entitled to make a call on the bond before or after the conclusion of the adjudication, and this necessarily involved the interpretation of the terms of the bond. To this end, as in the other cases discussed above, Fraser J referred to the established principles of interpretation laid down by the Supreme Court in the well-known authorities,[169] and emphasised that the court's focus was on the particular wording of the instrument in question.[170]

Fraser J considered that the bond in question was a conditional/performance bond rather than an on-demand bond, and that it was an instrument of secondary liability – this was clear from the language of the bond, which made no reference to a "demand", but instead provided that the guarantor would satisfy and discharge the damages sustained by Multiplex as established and ascertained pursuant to and in accordance with the provisions of or by reference to the contract in the event of Yuanda's breach of contract.[171]

With the above in mind, Fraser J considered that a sum could not be established and ascertained as due simply by Multiplex issuing a statement of sums considered to be due to itself, as Multiplex was not an independent decision maker or certifier and the contract did not contain any such certification process.[172] This was because the damages must be established and ascertained in accordance with the provisions of the underlying contract, and the relevant contractual framework for sums to become due and payable was therefore of pivotal importance.

In the circumstances, Fraser J concluded that an adjudication decision which awards a net sum to Multiplex would provide a sufficient basis for calling on the bond:

> "... a decision by the adjudicator that awards Multiplex any sum, when one considers the scope of the dispute referred to him, would undoubtedly qualify as being an amount "established and ascertained pursuant to and in accordance with the provisions of or by reference to the Contract". It would also take into account such defences as Yuanda would have available to it to defend, in the adjudication, the claim for £7,500,000. What those amounts are, if any, and how they fall to be taken into account when considering the claim brought by Multiplex, are matters in the adjudication. They are not matters that this court has to take into account, or in my judgment should take into account, when considering a demand made on the Guarantee, if the demand is for an amount that has been decided in Multiplex's favour in the adjudication. ..."[173]

The court's decision in *Yuanda* is understandable, as the conditional form of an ABI-type performance bond is to avoid abusive or vexatious calls on the bond by the beneficiary – this can happen in the case of an on-

166 Ibid, at para 206.
167 [2017] EWHC 3286 (TCC); [2018] BLR 98.
168 [2020] EWHC 468 (TCC); [2020] BLR 320.
169 Ibid, at paras 38 and 39.
170 Ibid, at paras 45 and 46.
171 Ibid, at paras 53 to 61.
172 Ibid, at para 70.
173 Ibid, at para 83.

demand bond, for instance, which does not normally require or permit any enquiry by the bondsman into the existence of the alleged breach or the underlying basis and ascertainment of the sum being demanded (assuming, of course, that the demand complies with the formalities prescribed by the bond).

> The court's decision in *Yuanda* is understandable, as the conditional form of an ABI-type performance bond is to avoid abusive or vexatious calls on the bond by the beneficiary

However, it is also worth stressing here that a different contractual framework with a different method of establishing liability for payment and damages for breach may very well lead to a different conclusion, especially if there is a payment certification and/or claim determination process involving a third-party contract administrator or project manager (as in the *Ziggurat* case). Indeed, Fraser J considered that his decision was consistent with the conclusion of Coulson J (as he then was) in *Ziggurat* on the basis that the respective contracts and factual contexts were different.[174]

In any event, what seems to be tolerably clear from the *Yuanda* decision is that an adjudicator's decision awarding damages or some other payment to a party is very likely to be a sufficient basis for calling on an ABI-type bond, subject always to the wording of the bespoke provisions in the bond and/or the underlying contract in question.

[174] Ibid, at paras 87 to 90.

PROFESSIONAL NEGLIGENCE

Professional negligence claims are often fact-sensitive, whether in terms of the scope of the duty of care owed or the issues of breach and loss. That being said, the courts' body of case law can provide helpful illustrations of the types of scenarios which can give rise to liability and the approach to assessing loss and damage. In 2020, this author acted for the claimant in *DBE Energy Ltd v Biogas Products Ltd*,[175] a case which proceeded under the Shorter Trials Scheme[176] (one of the few in the TCC) and provides a lot of food for thought for future professional negligence claims against designers and suppliers of specialist equipment.

The dispute involved a claim by DBE for remedial costs and loss of revenue as a result of the catastrophic failure of the digester tank heaters and pasteuriser tanks supplied by Biogas for DBE's anaerobic digestion facility in Dunsfold Park. The purchase orders expressly provided that Biogas had to design, fabricate, and deliver the vessels.

It was DBE's case that the failure of the pressure equipment was caused by Biogas' negligence and/or breach of contract in designing the equipment. Biogas, however, denied that the vessels constituted pressure equipment, and it in any event denied responsibility for the design of the operating pressure of the equipment.

The crux of Biogas' case was that the design of the maximum operating pressure of the vessels required knowledge of and involvement in the design of the hot water system as a whole, which went beyond Biogas' expertise and contractual obligations. Biogas relied on a number of parameter drawings, and contended that its design duties were strictly limited to the choice of thickness for the steel plates. This was a curious position to take, as common sense would dictate that a determination of the correct plate thickness had to at least take into account the amount of internal pressures the vessels would be exposed to (which, in turn, depended on the operating pressures in the relevant parts of the hot water system).

In a detailed judgment, Deputy High Court Judge Joanna Smith QC (now Mrs Justice Joanna Smith) started by confirming that Biogas' position "... extended beyond that of a simple manufacturer of goods, or building contractor with no design obligations and is analogous with that of a design and build contractor who can

[175] [2020] EWHC 1232 (TCC).
[176] Practice Direction 57AB of the CPR.

owe a duty of care in tort which is coterminous with its contractual duties".[177] This confirms the widely held view that the Court of Appeal's conclusion in *Robinson v PE Jones (Contractors) Ltd*[178] (ie that a building contractor does not usually owe concurrent duties in tort) would not necessarily apply where a contractor/manufacturer owes design obligations.

The judge then rejected Biogas' arguments on the facts – after analysing the significant volume of contemporaneous documents in detail, she concluded that Biogas contracted to and did indeed carry out extensive design works over a series of months in relation to the hot water system generally, even though there was an unusual lack of contractual documentation or specifications evidencing the design work that Biogas was to undertake on this project.[179] Importantly, even though Biogas asserted that another specialist process designer was primarily involved in designing the hot water system, this did not dilute Biogas' autonomous duties:

> "In the circumstances, it seems to me that in order to comply with its contractual duty to exercise reasonable care and skill in the design and fabrication of the Tank Heaters and Pasteuriser Tanks, Biogas was obliged to ensure that its design for the Tank Heaters and Pasteuriser Tanks could be safely integrated into the overall design of the AD Facility. It could not properly ignore the process and mechanical design work that it was undertaking, whether that design work was being done on its own, or (as I have found here) in conjunction with others. The act of working as a team with Mr Clarke did not divest Biogas of its duties in respect of that work."[180]

It is worth pointing out that Biogas' technical expert suggested during the hearing that the application of "sound engineering practice" under the Pressure Equipment (Safety) Regulations 2016 meant the mere exercise of "common sense", which the judge considered to be "extremely surprising and highly unlikely".[181] This is a cautionary tale for any supplier undertaking the design of specialist equipment, as a court is most likely to expect the exercise of reasonable skill and care to involve the consideration of relevant industry standards and guidance as a bare minimum, and to undertake appropriate design checks and calculations if required by such standards.

Another central tenet of Biogas' case was the allegation that DBE failed to mitigate its loss. Biogas' pleadings relied on a specific alternative solution (hydraulic separation of the equipment) in support of this contention, and it is noteworthy that Biogas' attempt to introduce unpleaded alternative solutions relevant to mitigation was robustly rejected by Waksman J at the Pre-Trial Review and led to the redaction of significant parts of Biogas' technical expert evidence (especially in light of the limited trial length of four days under the Shorter Trials Scheme).[182]

In the end, the court found that there was no failure to mitigate DBE's loss, given that the alternative remedial solution proposed by Biogas was not an obvious solution and was not necessarily quicker or cheaper.[183] In reaching this conclusion, the judge confirmed that "the duty to mitigate is not an exacting one", and the burden was on Biogas to make good its allegation, which was not at all persuasive in the absence of detailed quotations, specifications or calculations for the proposed solution.[184] This is a salutary reminder of the high threshold which a defendant has to meet in order to show that a claimant (who is the victim of the defendant's defaults) has failed to mitigate its loss, and this requires cogent evidence on the cost and feasibility of the alternative remedial solution.

This confirms the widely held view that the Court of Appeal's conclusion in *Robinson v PE Jones (Contractors) Ltd* (ie that a building contractor does not usually owe concurrent duties in tort) would not necessarily apply where a contractor/manufacturer owes design obligations

Based on the court's factual findings on liability and causation, Biogas was held to be liable for the remedial costs, as well as the forecast loss of revenue resulting from the delay to the operation of the facility after the failure of the pasteuriser tanks. Although the nature of the forecast loss (the plant was not yet in full operation at the time of the trial) meant that proof of the quantum was not at all straightforward, the court was not prevented from awarding damages where DBE had clearly suffered a loss:

177 Ibid, at para 118.
178 [2011] EWCA Civ 9; [2011] BLR 206.
179 *DBE*, at para 107.
180 Ibid, at para 107.3.
181 Ibid, at para 128.
182 [2020] EWHC 401 (TCC).
183 *DBE*, at paras 179 to 186.
184 Ibid, at paras 178 and 179.

> "... Whilst the process of assessing that loss cannot be an exact science and inevitably involves an assessment based on the available evidence (including the opinions of the quantum experts), it seems to me that, consistent with the guidance in One Step set out above, I must do my best to arrive at a fair and reasonable figure."[185]

The moral of the story is that a contractor/supplier should be careful when taking on design obligations in respect of specialist equipment, and where there is a clear failure to have regard to a key consideration which is plainly relevant to the safety and operability of the equipment, the court would have little sympathy with arguments that the employer or some other third party was expected to provide the requisite information, or that some other remedial solution would have been more appropriate even where no such proposal was offered when the defect was first notified.

[185] Ibid, at para 220.

ARBITRATION LAW

Given that arbitration (both domestic and cross-border) is an important facet of the resolution of construction disputes, it would be remiss of this article not to mention two very important and highly anticipated Supreme Court decisions handed down towards the end of the year in relation to arbitrations.

First, in October 2020, the Supreme Court delivered its judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb and Others*[186] on the determination of the law applicable to an arbitration agreement, which has since been discussed extensively by practitioners and academics alike. The dispute relates to Enka's subcontract in respect of the construction of a power plant in Russia, which was damaged by fire and resulted in a substantial pay-out by the owner's insurer, Chubb. Chubb was subrogated to the owner's rights and sought to bring claims in the Russian court against Enka for its defective works, but the subcontract was in fact subject to an ICC arbitration clause with England as the seat.

Enka sought an anti-suit injunction in the UK courts, but Chubb contended that Russian law applied to the arbitration agreement such that it was more appropriate for the Russian courts to determine the validity and scope of the arbitration clause. In a detailed majority judgment delivered by Lord Hamblen and Lord Leggatt, the Supreme Court provided some important guidance on the principles relevant to the determination of the law applicable to an arbitration agreement, and differed from the Court of Appeal in reasoning albeit not in result.

The starting point was that there were "... strong reasons why an agreement on a choice of law to govern a contract should generally be construed as applying to an arbitration agreement set out or otherwise incorporated in the contract", as this was in the interest of certainty, consistency and coherence, and it avoided potential complications and uncertainties in drawing the boundaries between the two systems of law (eg where the contract contains a multi-tier dispute resolution clause).[187] This, the court observed, was also the approach adopted in Singapore, India, Pakistan, Germany and Austria, and particular reference was made to a few decisions in Singapore.[188]

It is noteworthy that the majority expressly rejected the so-called "overlap argument" endorsed by the Court of

[186] [2020] UKSC 38; [2020] 2 Lloyd's Rep 449; (2020) CILL 4525.
[187] Ibid, at paras 53 and 54.
[188] Ibid, at paras 56 to 58.

Appeal – according to this school of thought, the overlap between the scope of the curial law and that of the arbitration agreement law strongly suggests that they should be the same, and so the choice of seat and curial law points to the implied choice of the law of that place to apply to the arbitration agreement. Lord Hamblen and Lord Leggatt considered that such an inference may be justified in some cases based on the content of the relevant curial law, but the Arbitration Act 1996 does not support such a general inference as it expressly provides for a situation where foreign law governs the arbitration agreement even though English law is the curial law.[189]

This is likely to be a key battleground in future cases where, for instance, a putative applicable law potentially renders the arbitration clause invalid or ineffective, and it will be interesting to see how the courts apply the Supreme Court's dicta

The majority of the court considered that it was impossible to decide in the abstract when or whether a putative applicable law which impairs the commercial purpose of an arbitration agreement would negate the presumption in favour of applying the governing law of the contract to the arbitration clause, as this would depend on the contractual language and factual circumstances in each case.[190] This is likely to be a key battleground in future cases where, for instance, a putative applicable law potentially renders the arbitration clause invalid or ineffective, and it will be interesting to see how the courts apply the Supreme Court's dicta.

Furthermore, the majority of the court pointed out that a choice of London as the seat was not necessarily linked to an intention of appointing arbitrators with experience in English law, and similarly, this was not a sufficient reason to infer that the governing law of the contract and the law applicable to the arbitration agreement should be English law.[191] This caveat seems eminently sensible, as English arbitrators and courts are frequently called upon to apply foreign law with the assistance of expert evidence, just as English law firms and barristers regularly act for foreign parties in arbitrations governed by foreign law.

The above principles, however, did not decide the question in *Enka*, as the subcontract in that case did not contain any express choice of governing law either for the contract or for the arbitration agreement. In the circumstances, the court had to apply the "closest connection" test, and the majority held (with Lord Burrows and Lord Sales dissenting):

> "Even where the parties have not agreed what law is to govern their contract, it is reasonable to start from an assumption – for reasons given earlier – that all the terms of the contract, including an arbitration clause, are governed by the same system of law. Where, however, the parties have selected a place for the arbitration of disputes, there is authority for, as a general rule, regarding the law with which the arbitration agreement is most closely connected as the law of the seat of arbitration. …"[192]

The majority's reasoning emphasised that the seat of arbitration is the place where (legally, even if not physically) the arbitration agreement is to be performed (whereas there is no such connection with the place of performance of the underlying contract), and the common law has historically attached the greatest weight to this factor.[193] This was considered to be consistent with international law and legislative policy,[194] and above all, such a default rule provides certainty and is likely to uphold the reasonable expectations of contracting parties which have chosen to settle their disputes by arbitration in a specified neutral seat but made no choice of law for their contract.[195]

On the facts, although the substantive governing law of the subcontract was Russian law pursuant to article 4(3) of the Rome I Regulation,[196] the majority of the court held that English law applied to the arbitration agreement in light of the seat of the arbitration, and importantly this extended to the entire multi-tier dispute resolution procedure as "… it is reasonable to expect that, where a multi-tiered procedure is chosen, the law which determines the validity and scope of the arbitration agreement will determine the validity and scope of the whole dispute resolution agreement".[197]

189 Ibid, at paras 73 to 94.
190 Ibid, at para 109.
191 Ibid, at para 117.
192 Ibid, at para 119.
193 Ibid, at paras 121 to 124.
194 Ibid, at para 125 to 141.
195 Ibid, at para 142 to 144.
196 Ibid, at para 161.
197 Ibid, at paras 162 to 169.

In any event, the majority of the court observed that the English courts were entitled to grant an anti-suit injunction because the relevant principles do not depend on the law applicable to the arbitration agreement, as the parties had chosen England as the seat and agreed to submit to the supervisory jurisdiction of the English courts.[198] Where a party had brought legal proceedings in breach of the arbitration agreement, "... deference to the foreign court should generally give way to the importance of upholding the parties' bargain and restraining a party to an arbitration agreement from doing something it has promised not to do".[199]

The principles underlying the majority decision in *Enka* are likely to remain controversial among practitioners and academics, and this is obvious from the narrow three to two majority and the points raised in the dissenting judgments of Lord Burrows and Lord Sales – in essence, they opined that the proper governing law of the contract, ie Russian law, should also apply to the arbitration agreement and dispute resolution procedure by implication, and that the default rule where there is an express choice of governing law applied with equal force to the situation in *Enka*.

Putting to one side the doctrinal differences between the majority and dissenting judgments, the practical implications of the *Enka* decision are clear and do provide certainty – the default rule is that an express choice of governing law would usually apply to the arbitration agreement, but where there is no such express choice, the law applicable to the arbitration agreement is most likely to be the law of the seat of the arbitration.

As far as arbitrations seated in England are concerned, it would make life easier for the English courts in cases where the parties have not expressly specified a foreign governing law for the substantive contract or the arbitration agreement. From the perspective of parties intending to incorporate arbitration clauses into their contracts, nothing in the *Enka* decision is meant to override the freedom of contract, and it remains open to parties to expressly specify the substantive governing law and/or the law applicable to the arbitration agreement. As a matter of good practice, parties and their legal representatives should give careful consideration to what they would like to achieve when drafting arbitration clauses, bearing in mind the default rules now laid down by the Supreme Court.

198 Ibid, at para 173 to 185.
199 Ibid, at para 183.

The second Supreme Court decision of general interest is *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)*,[200] which was another highly-anticipated judgment and was handed down in November 2020. This case concerned the question of apparent bias where an arbitrator has failed to disclose appointments in multiple potentially overlapping arbitrations involving only one common party. The relevant arbitrations arose from the explosion and fire on the Deepwater Horizon drilling rig in 2010, which was one of the most serious industrial disasters in recent times.

Lord Hodge delivered the judgment of the court and upheld the Court of Appeal's conclusion that there was no apparent bias on the facts of the case, although for reasons which differed in part. The court started by reiterating that the obligation of impartiality was a core principle of arbitration law which applied equally to all arbitrators,[201] and that the assessment of the fair-minded and informed observer of whether there was a real possibility of bias was an objective assessment which had regard to the realities of international arbitration and the customs and practices of the relevant field of arbitration.[202]

As a matter of good practice, parties and their legal representatives should give careful consideration to what they would like to achieve when drafting arbitration clauses, bearing in mind the default rules now laid down by the Supreme Court

In circumstances such as the Bermuda Form arbitration in *Halliburton*, the acceptance of appointments in multiple references with potentially overlapping subject matters might reasonably give rise to a conclusion by the objective observer that there was a real possibility of bias. On this basis, the arbitrator is under a legal duty to disclose such appointments unless the parties to the arbitration have agreed otherwise,[203] and a failure to do so would be a factor for the fair-minded and informed

200 [2020] UKSC 48; [2021] BLR 1.
201 Ibid, at paras 49, 63 and 151.
202 Ibid, at paras 56 to 68, 127 to 131 and 152.
203 Ibid, at paras 76 to 81, 132 to 136 and 153.

observer to take into account in assessing whether there is a real possibility of bias.[204]

The above duty gives rise (at least at first sight) to a tension between the duty of disclosure and impartiality on the one hand and the duty of privacy and confidentiality on the other. However, in the absence of a contract or binding rules restricting or prohibiting disclosure, disclosure of certain information may be made without obtaining the express consent of the parties to the relevant arbitration where the needed consent is inferred (eg from the arbitration agreement itself in the context of the practice in the relevant field).[205] Lord Hodge indicated that:

> "... the disclosure in such circumstances ought to have included (i) the identity of the common party who was seeking the appointment of the arbitrator in the second reference, (ii) whether the proposed appointment in the second reference by the common party was to be a party-appointment or a nomination for appointment by a court or a third party, and (iii) a statement of the fact that the second reference arose out of the same incident. ... A high-level statement as to whether similar issues were likely to arise ... would also involve no breach of the arbitrator's duty of privacy and confidentiality. ..."[206]

On the facts, having regard to the circumstances as at and from the date when the duty of disclosure arose (including the facts and circumstances known at the date of the hearing),[207] the Supreme Court concluded that the arbitrator's oversight did not give rise to an inference of a real possibility of unconscious bias. Importantly, Lord Hodge emphasised the uncertainty at the time regarding the duty of disclosure, the time sequence of the various references, the arbitrator's measured response and lack of any animus toward Halliburton, the arbitrator's reasonable expectation that the other references would be resolved by the preliminary issues and there would not be any overlap in evidence or submissions, and the absence of any secret financial benefit.[208]

It is noteworthy that the majority of the court was careful to confine the ruling to the Bermuda Form arbitrations in question, even though the submissions of ICC, LCIA and CIArb indicated that there was a common practice in English-seated arbitrations of making a confidential disclosure of involvement in an arbitration involving a common party without obtaining the express consent of the parties to that arbitration.[209]

In light of the court's reservation on the issue of consent in other types of arbitration where there are no institutional rules addressing the question of disclosure, this issue may well give rise to further disputes in the future requiring the courts' intervention, although Lady Arden observed separately that it is difficult to limit what is said in *Halliburton* to Bermuda Form arbitrations as opposed to other ad hoc arbitrations or those held under institutional rules which make no relevant provision.[210]

In practice, this may be resolved by discussion and cooperation between an arbitrator and the parties in the relevant arbitrations prior to making any disclosure and indeed, as Lady Arden pointed out, a high-level disclosure of the multiple appointments without naming the parties (unless the identity of the parties would be obvious) may well suffice to discharge the duty of disclosure without breaching any duty of confidentiality.[211] Where consent is necessary but not forthcoming, however, Lady Arden observed that the arbitrator should decline the proposed appointment.[212]

It also bears emphasis that the issue of disclosure only arises if the arbitrator does not consider that there is an incompatible conflict of interest as a result of accepting the multiple appointments, given the overriding importance of the duty of impartiality – after all, the purpose of disclosure to all the parties involved is to ensure the equality of arms and allow parties to consider/raise any potential conflict of interest which they are not prepared to waive.[213]

Parties and arbitrators embarking on concurrent arbitrations will find the Supreme Court's latest guidance on the disclosure of multiple appointments helpful, especially since this is not at all an uncommon scenario in construction disputes and a number of well-known arbitrators are highly sought after. The clear affirmation of the duty of disclosure in appropriate circumstances is important as a benchmark for the conduct of arbitrators. It goes without saying that (subject to the issue of consent) transparency is often the best policy, and an arbitrator who is careful and expressly raises the issue of disclosure for consideration is much less likely to give rise to an appearance of bias.

204 Ibid, at paras 117 to 118 and 155.
205 Ibid, at paras 76 to 81, 88 to 104, 146 and 154.
206 Ibid, at para 146.
207 Ibid, at paras 119 to 123, 156 and 157.
208 Ibid, at para 149.
209 Ibid, at para 105.
210 Ibid, at para 171.
211 Ibid, at para 184.
212 Ibid, at para 188.
213 Ibid, at paras 79, 108 and 170.

GLOBAL PERSPECTIVES IN DISPUTE RESOLUTION

The Covid-19 pandemic does not appear to have dampened the pace of legal developments in other jurisdictions relating to the resolution of construction and infrastructure disputes, and these developments are relevant for comparative purposes and also for those with an international practice. As in previous years, this review will briefly consider some of the interesting developments in Hong Kong, Singapore and the Middle East.

Hong Kong

The social distancing restrictions and travel bans resulting from the Covid-19 pandemic have provided a new impetus for the courts in Hong Kong to consider the increased use of remote hearings by telephone and/or video conference, which were not commonly adopted by the Hong Kong courts prior to the pandemic even though such facilities are often used in arbitral proceedings. The primary objection to the use of remote hearings has been the general principle for the open and public administration of justice.

In *Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Company Ltd and Others*,[214] the Court of First Instance (CFI) in Hong Kong made a landmark ruling on the appropriate use of telephone hearings for case management hearings, during the general adjournment period which entailed the closure of all courts at the time until further notice due to public health concerns. Coleman J concluded without any hesitation that a telephone hearing was appropriate in the circumstances to avoid unnecessary delay and promote active and efficient case management. The hearing was held without any technical difficulties in the end, although it required some prior coordination between the parties.

Importantly, Coleman J observed in his ruling that the use of telephone hearings to deal with case management directions may become the new norm in the future:

> "In fact, the current Covid-19 crisis is actually an opportunity for the courts and parties to litigation to reassess how cases can best be actively managed in furtherance of the underlying objectives. Whilst this ruling is born of the current circumstances, and addresses those circumstances, there seems to me to be a strong argument for moving matters in a similar way beyond the end of the crisis."[215]

This movement towards the use of technology to facilitate the fair and efficient disposal of court proceedings in Hong Kong is certainly a positive development, especially in light of the already well-established use of telephone and video hearings in other common law jurisdictions like the UK. The pandemic is not going to vanish overnight, and social distancing measures are expected to come and go from time to time, which may cause significant disruption to the administration of justice without more flexible hearing arrangements.

It does not appear that the courts in Hong Kong have taken the wider step of conducting trials and other more substantial hearings remotely (unlike in the UK, as explained earlier in this article), but this would be the next logical step in the evolution of court proceedings. In order for this to happen, both the courts and legal representatives in general would need to have appropriate video conferencing facilities in place, and this process may require time over the coming years.

Hand in hand with the modernisation of court proceedings, the Department of Justice in Hong Kong also launched a Covid-19 Online Dispute Resolution (ODR) Scheme[216] on 29 June 2020, which aims to support individuals and businesses affected by the coronavirus in resolving disputes with a monetary value below HK$500,000 (ie below approximately £50,000) through negotiation, mediation and arbitration.

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The ODR Scheme is operated by the eBRAM International Online Dispute Resolution Centre (eBRAM) which offers a video conferencing platform. However, it is worth noting that the ODR Scheme is directed at commercial, contractual, tortious, property, family or tenancy

214 [2020] HKCFI 347.

215 Ibid, at para 40.

216 See www.ebram.org/covid_19_odr.html.

disputes "arising directly or indirectly out of the Covid-19 pandemic", and one of the parties has to be a Hong Kong resident or a company registered in Hong Kong.

The ODR Scheme consists of three stages or "tiers", namely negotiation, mediation and arbitration. The timetable starts running once the parties enter into an ODR agreement and eBRAM notifies the parties of the availability of the ODR agreement on the platform. A list of mediators/arbitrators would be provided by eBRAM for agreement, failing which eBRAM would appoint one for the parties (which can be challenge by each party for up to three times). The expectation is that parties would be able to obtain an arbitral award within around two months.

In addition to efficiency and convenience, a significant benefit of using the ODR Scheme is that the costs of the mediator/arbitrator would be borne by the Hong Kong Government, although the legal costs of the arbitration would typically follow the event as in other arbitral/legal proceedings, and each party is required to pay a registration fee in the sum of HK$200. This is another encouraging start for the wider use of ODR in Hong Kong, and the next step may be to roll out a similar pilot scheme in the Hong Kong courts.

The ODR Scheme was by no means the only development in 2020 for arbitration in Hong Kong. On the same day as the launch of the ODR Scheme, the Hong Kong Government also introduced the Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong,[217] which enables arbitrators, expert/factual witnesses, counsel and parties to an arbitration to participate in arbitral proceedings in Hong Kong as visitors for a timeframe not exceeding their visa-free period, without having to obtain employment visas as previously required. The Pilot Scheme applies to nationals of any country/region allowed to visit Hong Kong without a visa for a certain period, and all that is required is a letter of proof of eligibility from HKIAC or the Hong Kong Department of Justice for ad hoc arbitrations, or from one of the recognised arbitral institutions[218] for institutional arbitrations.

Further, on 27 November 2020, the Chinese Supreme People's Court and the Hong Kong Department of Justice entered into the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR.[219] In summary, the Supplemental Arrangement clarifies that the arrangement applies to procedures for both the recognition and the enforcement of arbitral awards, and that it covers all arbitral awards made pursuant to the Arbitration Ordinance (Cap 609), ie both ad hoc and institutional arbitrations.

Importantly, the Supplemental Arrangement extends the current framework by permitting parallel enforcement proceedings in Hong Kong and the mainland, as well as applications to the relevant courts for preservation measures before or after the enforcement of an arbitral award. This development will be welcomed by parties and practitioners engaging in cross-border arbitrations, as it expands the procedural arsenal available to parties when it comes to enforcement and interim measures pending enforcement. Moreover, this will no doubt be a relevant consideration when parties in Hong Kong and the mainland decide on the seat of the arbitration in the future for transactions with a cross-border element.

In addition to the above procedural developments, the Hong Kong courts have also had the occasion to consider novel issues arising from the courts' supervisory jurisdiction. For instance, in *Bond Tak (Holdings) Ltd v King Fame Trading Ltd*,[220] where the parties entered into an agreement for the transfer of shareholdings in five instalments which contained a governing law clause and an arbitration clause. The third instalment was revised by a settlement agreement (which expressly took precedence over the original transfer agreement), and it expressly provided that any further disputes between the parties shall be settled through friendly negotiation, and failing that, through litigation in the Hong Kong courts.

The claimant commenced proceedings in Hong Kong alleging that the defendant failed to pay the fourth instalment, and the defendant applied to the court to stay the proceedings on the basis of the arbitration agreement in the transfer agreement and on grounds of forum non conveniens. The CFI robustly dismissed the application, concluding that there was an exclusive jurisdictional clause in the settlement agreement which unequivocally applied to any disputes arising from the project, and this was not affected by the recitals (which were slightly ambiguous) or the conflicting provisions in the transfer agreement (which the settlement agreement expressly superseded).[221]

217 See www.info.gov.hk/gia/general/202006/29/P2020062900772.htm.

218 HKIAC, CIETAC Hong Kong Arbitration Centre, ICC Asia Office, Hong Kong Maritime Arbitration Group, South China International Arbitration Centre or eBRAM.

219 See www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementr_e.pdf.

220 [2020] HKCFI 1509.

221 Ibid, at paras 25 to 27.

The past year has also been an interesting one for Hong Kong in terms of substantive developments relevant to the construction industry. Readers will recall from the reviews in 2018 and 2019 that one of the most high-profile events in the construction industry was the commission of inquiry (COI) into the Mass Transit Railway Corporation Ltd (MTRCL) Shatin-to-Central Link Project. In March 2020, the COI presented the Final Report of Commission of Inquiry into the Construction Works at and near the Hung Hom Station Extension under the Shatin to Central Link Project[222] to the Hong Kong Government, and this was published in May 2020.

The final report concluded that there was consensus that, with the suitable measures completed, the station box and the other structures examined would be safe and fit for purpose, which was the key finding for the purpose of completing and opening the new railway line to the public. The inquiry also concluded, however, that there were significant deficiencies in the management and supervision systems implemented by MTRCL and the main contractor, Leighton, and the Hong Kong Government also bore a measure of responsibility for failing to identify the issues in a timely manner.

By way of summary, these deficiencies related to the supervision and inspection of the installation of reinforcement bars (rebars) and the coupler splicing assemblies for rebars, record-keeping of such supervision and inspection using so-called "RISC forms", sampling and testing of materials on site, and management of design changes relating to these installations.

In particular, the COI considered that there was a lack of clarity in the allocation of responsibility for supervision and inspection, and the process for issuing and closing out non-conformance reports also needed to be reviewed. The COI emphasised the need for a more collaborative culture among all the parties involved, and proper use should be made in the future of available technology for systematic data collection and for producing contemporaneous records of quality inspections. To this end, both MTRCL and the Hong Kong Government have already been implementing expert recommendations for improving project management.

This report will have an impact on the future procurement of contracts by the Hong Kong Government and MTRCL, and parties can expect a higher degree of scrutiny during the tender stages (and throughout the life of a project) when it comes to a contractor's internal quality assurance and quality control procedures. The Buildings Department in Hong Kong is also likely to take a more active approach in spot-checking site inspection records and reviewing as-built records forming part of any BA12/13/14 submission to certify completion and/or apply for an occupation permit.

These same considerations are very likely to percolate to other projects in the construction industry, as developers, contractors and project managers become more attuned to the importance of good project management and record-keeping practices. Anecdotally, this author has seen contractors in Hong Kong projects implementing more stringent requirements for the supervision and inspection of rebar installations, utilising technology such as smartphone applications and video recordings to monitor the quality of the works on site. It remains to be seen whether this will have a material impact on the costs of construction projects and contractors' tender allowances.

In the courts, the CFI had to consider *West Kowloon Cultural District Authority v AIG Insurance Hong Kong Ltd*,[223] which concerned an attempt by the bondman to challenge the authority's call on an on-demand bond (citing the contractor's default by virtue of its insolvency), on grounds of non-compliance with formality requirements and alleged fraud. It is trite law that challenges on these grounds often face an uphill struggle, as there is a strong presumption in favour of the fulfilment of independent banking commitments (of which on-demand bonds are one example), and there is a heavy burden on the party relying on fraud which requires particularly cogent evidence.[224]

In the event, the CFI had little difficulty rejecting the purported challenges. On the issue of formalities, Ng J held that the terms of the bond did not require the authority to particularise the default in question or the quantum of the loss or damage, and a fair interpretation of the demand showed that the authority sufficiently stated the amount of loss suffered as a result of the contractor's default.[225] As for the allegation of fraud, Ng J did not consider that there was any lack of bona fide belief in the contractor's insolvency simply because of the absence of any determination in prior insolvency proceedings or the contractor's bare denial, and it was also irrelevant that the demand was issued on the same date as the termination of the contractor's employment.[226]

The CFI's decision in *West Kowloon* confirms that its approach to on-demand bonds is consistent with the

222 See www.coi-hh.gov.hk/pdf/COI_Final_Report_Eng.pdf.

223 [2020] HKCFI 569; [2020] BLR 485.
224 Ibid, at paras 45 to 47.
225 Ibid, paras 29 to 43.
226 Ibid, at paras 48 to 57.

English authorities and firmly in favour of upholding the bondsman's contractual commitments, save in exceptional cases where a clear case of non-compliance with the formalities or fraud can be made out. This decision will be welcomed by employers and main contractors in the industry who have the benefit of an on-demand bond, and parties will need to give careful consideration to the prospects and risks of challenging a call on a bond other than in the clearest of cases.

Singapore

The past year has also seen a number of legal developments in relation to the arbitration landscape in Singapore. On 1 December 2020, the International Arbitration (Amendment) Act 2020 came into force, amending the Singapore International Arbitration Act (SIAA).

The new s9B of the SIAA now provides a default procedure for the appointment of arbitrators in multipartite arbitrations with three arbitrators, which applies where the parties have not agreed to any specific appointment procedure. In essence, each party is required to appoint an arbitrator, and those two arbitrators would jointly appoint the presiding arbitrator. If the appointments do not take place within the specified timeframe, then an appointing authority (who is the president of the Court of Arbitration of the Singapore International Arbitration Centre (SIAC) by default) will step in. This brings the SIAA in line with the position adopted in Article 11 of the UNCITRAL Model Law and comparable provisions of arbitration laws in other jurisdictions (eg s24 of the Arbitration Ordinance in Hong Kong, and ss16 and 18 of the Arbitration Act 1996 in the UK).

Further, the new s12(1)(j) and amended s12A(2) of the SIAA now expressly empower an arbitral tribunal seated in Singapore and the Singapore High Court respectively to enforce obligations of confidentiality arising from the parties' agreement, statute or other rules of law and/or any applicable institutional rules. It is important to emphasise that this does not give rise to a new freestanding obligation of confidentiality where none otherwise exists.

These developments are steps in the right direction and will no doubt be welcomed by the arbitration community in the region. It is worth noting that a number of outstanding proposals for reform are still under consideration, including a proposal to introduce an opt-in to allow parties to appeal to the court on questions of law arising out of an arbitral award, and a proposal to allow parties to agree to waive or limit the grounds for annulling an arbitral award, for which provisions can be found in the arbitration laws of other common law jurisdictions such as Hong Kong and the UK. It will be interesting to see whether these proposals will be introduced as a further bill for debate and passage in the Singaporean legislature.

> The CFI's decision in *West Kowloon* confirms that its approach to on-demand bonds is consistent with the English authorities and firmly in favour of upholding the bondsman's contractual commitments, save in exceptional cases where a clear case of non-compliance with the formalities or fraud can be made out

Another interesting development in 2020 was the Singapore International Mediation Centre's Memorandum of Understanding with the Shenzhen Court of International Arbitration[227] (SIMC-SCIA MOU). The SIMC-SCIA MOU provides a mediation-arbitration service to enable businesses to resolve commercial disputes in an efficient and cost-effective manner without litigation, in order to support business partnerships and projects under the Singapore-China Smart City Initiative.

The implementation of the SIMC-SCIA MOU means that where a mediation is administered by SIMC, any resulting mediated settlement agreement may be recorded by the SCIA as an arbitral award, in accordance with the SCIA Arbitration Rules, and at the same time, the SCIA can refer appropriate cases to the SIMC for mediation. This hybrid dispute resolution procedure is another encouraging initiative promoting ADR for projects in the region, and it will be interesting to see if further pilot schemes will be introduced for other projects/transactions in the future.

On top of the foregoing developments, 2020 has also been a prolific year for the Singapore courts when it comes to arbitration cases – for instance, *China Machine New*

[227] See simc.com.sg/blog/2020/06/17/simc-and-the-shenzhen-court-of-international-arbitration-scia-establish-international-dispute-resolution-service-for-cross-border-commercial-projects-under-singapore-china-shenzhen-smart-city-init/.

Energy Corp v January Energy Guatemala LLC,[228] which arose from an ICC arbitration of a dispute relating to the construction of a power generation plant in Guatemala under an EPC contract. The tribunal rendered its award in November 2015, and the unsuccessful party applied to the court in February 2016 to set aside the award on grounds of breach of natural justice.

The Singapore Court of Appeal upheld the High Court's decision and rejected the appellant's arguments. The court recognised that the right to be heard, albeit important, was not unlimited, and the court would afford a margin of deference to the tribunal in matters of procedure bearing in mind the range of things that a reasonable and fair-minded tribunal would do.[229]

On the facts, the court considered that the disclosure of sensitive documents on an "attorney's eyes only" basis (and later on a redacted basis) was reasonable,[230] and the failure to order the disclosure of certain construction documents in the respondent's possession did not cause any prejudice as the appellant never requested those documents.[231] As for the appellant's late submission of quantum expert evidence in response to the rolling disclosure of cost documents, the tribunal did allow an extension of time and there was nothing unreasonable about the rejection of the request for a second extension, and above all, the tribunal did not strictly exclude the late materials.[232]

The court also had little sympathy with the appellant's contention that the tribunal's mismanagement of the arbitration meant that the arbitration and/or the scheduled evidential hearing could not have proceeded. The appellant did not raise any such concerns prior to the hearing, but instead pressed for the hearing to go ahead.[233] On the whole, this is a timely reminder to parties that the threshold for challenging an arbitral award on grounds of procedural unfairness is a very high one, especially where objections are raised retrospectively but not during the course of the proceedings.

In contrast, in *CBP v CBS*[234] (which arose from an arbitration of a dispute relating to the sale and purchase of coal), the arbitrator rejected the responding party's request for a hearing to cross-examine witnesses, and only directed an oral hearing by telephone which did not allow any witnesses to be present. The responding party did not participate in this hearing, and the arbitrator proceeded to rule in favour of the claimant.

In the Singapore High Court, Ang Cheng Hock J held that there was a breach of natural justice which caused actual prejudice to the responding party. The Rules of the Singapore Chamber of Maritime Arbitration did not allow an arbitrator to prevent a party from calling witnesses where a document-only procedure had not been agreed, especially since a fundamental part of the defence was based on an alleged oral agreement but most of the relevant witnesses were not employed by the responding party and had to be summoned.[235] This case therefore fell onto the other end of the spectrum and justified the setting aside of the award.

This is a timely reminder to parties that the threshold for challenging an arbitral award on grounds of procedural unfairness is a very high one, especially where objections are raised retrospectively but not during the course of the proceedings

Two other decisions from the Singapore Court of Appeal are worth mentioning, as they have wider implications on parties seeking to set aside an arbitral award or oppose enforcement. In *BRS v BRQ and Another*,[236] the Singapore Court of Appeal clarified the interpretation of Articles 34(3) of the UNCITRAL Model Law (as incorporated by Schedule 1 of the SIAA), which provides that "[a]n application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal".

The question related to the meaning of a "request … made under Article 33" – Article 33 of the UNCITRAL Model Law allows three specific types of requests, namely: (i) requests for the correction of errors in computation, any clerical or typographical errors or any errors of similar nature; (ii) requests for an interpretation of a specific point

228 [2020] SGCA 12.
229 Ibid, at para 104.
230 Ibid, at para 111, 113 and 116.
231 Ibid, at paras 124 and 125.
232 Ibid, at paras 131 to 159.
233 Ibid, at paras 165, 171 and 172.
234 [2020] SGHC 23.
235 Ibid, at paras 63 to 83.
236 [2020] SGCA 108.

or part of the award; and (iii) requests for an additional award as to claims presented in the arbitral proceedings but omitted from the award. The court emphasised that for a request to effectively extend the time allowed under Article 34(3) for applying to set aside an award, one must consider whether the substance (and not just the form) of the request purportedly made falls within one of the three types of permitted requests.[237]

On the facts of that case, the corrections requested were in fact seeking to reopen substantive matters and rerun arguments already determined by the tribunal, such that the request was ineffective for the purposes of Articles 33 and 34 and the setting-aside application was time-barred.[238] This is a cautionary tale for parties which seek to disguise substantive arguments on the merits as speculative requests to correct/clarify an arbitral award, as this may well backfire down the line if the request is relied on to extend the deadline for applying to set aside the award. That said, it is theoretically open to a party to make requests under the Article 33 of the UNCITRAL Model Law while concurrently applying to the court to set aside that same award.

Finally, in *BBA and Others v BAZ and Another*,[239] the Singapore Court of Appeal clarified an important point regarding the types of issues which can give rise to a jurisdictional objection as a ground for setting aside an arbitral award. One of the arguments advanced by the appellants was that the limitation issue could be reviewed de novo by the seat court (ie the Singapore courts) as a jurisdictional issue, which the appellants contended was wrongly decided by the tribunal.

The Singapore Court of Appeal concluded that it was Singapore law (as the lex arbitri as well as the law of the seat court) which governed the classification of the limitation issue, and under Singapore law, issues of time bar arising from statutory limitation periods went towards admissibility rather than jurisdiction.[240] On this basis, the court applied a "tribunal versus claim" test which asked whether the objection was targeted at the tribunal or at the claim, and it concluded that issues of statutory limitation periods went towards admissibility as they attacked the claim, irrespective of whether the applicable limitation period is characterised as procedural or substantive from a conflicts of law perspective.[241]

The *BBA* decision is another helpful clarification of the limits of jurisdictional challenges for the purpose of setting aside an award. It is clear that the court is astute to reject novel attempts to recast substantive matters determined by a tribunal as jurisdictional issues in order to have a second bite at the cherry in court. These recent cases demonstrate that the Singapore courts continue to adopt a robust pro-arbitration approach which faithfully enforces arbitral awards unless there is a clear case of excess of jurisdiction or serious irregularity, and it is expected that parties involved in construction and engineering projects in the region will continue to see Singapore as one of their preferred seats for commercial arbitrations.

Middle East

As with Hong Kong and Singapore, the Middle East continues to be a fast-developing scene for dispute resolution. Figures have shown, for instance, that as at February 2020, the Dubai International Finance Centre (DIFC) Courts have been witnessing a year-on-year increase of 43 per cent in the number of cases heard, and many of the innovations in the DIFC Courts have been followed or taken into account in other free zone courts in the UAE.

A number of notable legislative changes and cases have taken place over the past year. To take one example, on 14 May 2020, a number of important amendments to Article 13 of the Founding Law[242] of the Abu Dhabi Global Market (ADGM) came into force, in order to align the ADGM's framework and operations with international best practices and standards. The ADGM Courts have published a guidance paper to explain these new amendments.[243]

The amendments to the ADGM's Founding Law include, among other things: the formalisation of the dual licensing regime to enable ADGM entities to establish branches, subsidiaries or representative offices in Abu Dhabi without needing a place of residence outside ADGM; the recognition of the ADGM Courts as part of Abu Dhabi's judicial system (with all ADGM Court judgments issued in the name of the ruler of Abu Dhabi); the codification of the reciprocal enforcement of judgments between the ADGM Courts and the Abu Dhabi Courts; and provisions allowing any party to select the ADGM Courts as the forum for dispute resolution without requiring any connection to the ADGM.

237 Ibid, at paras 64 to 72.
238 Ibid, at paras 73 to 83.
239 [2020] SGCA 53.
240 Ibid, at paras 64 to 66.
241 Ibid, at paras 76 to 81.

242 Abu Dhabi Law No (4) of 2013 Concerning Abu Dhabi Global Market.
243 ADGM Courts, "Guide to Amendments to Article 13 of Abu Dhabi Law No 4 of 2013", May 2020, www.adgm.com/documents/courts/legislation-and-procedures/guidance-papers/adgm-courts-guide-to-amendments-to-article-13-of-the-founding-law.pdf.

These changes will broaden the scope and attraction of the ADGM (and the UAE more generally) as an international financial centre and forum for international dispute resolution, and readers should watch the growth of the ADGM and its courts over the coming years to see the extent to which parties in the region (and indeed beyond) will increasingly confer jurisdiction on the ADGM Courts to resolve their disputes, especially those arising from construction and infrastructure projects with a cross-border element and/or international stakeholders.

At the same time, the Dubai courts also rendered a number of interesting judgments in 2020 which contributed to the development of the UAE's arbitration law. In Case No 32/2019,[244] the UAE courts had the first occasion to exercise their supervisory jurisdiction under Article 19 of the UAE's Federal Arbitration Law[245] with regard to an arbitral tribunal's determination of its own jurisdiction.

Under Article 19(2) of the Federal Arbitration Law, a party can request the president of the competent Court of Appeal to rule on a matter of jurisdiction within 15 days from the date it has been notified of an arbitral tribunal's determination of its own jurisdiction. The relevant court will in turn have to provide a final and binding decision on this issue within 30 days of being seized, during which time the arbitral proceedings would be stayed.

In Case No 32/2019, the Dubai Court of Appeal overturned the arbitral tribunal's determination and found that it lacked the requisite jurisdiction. The court found that the FIDIC form of contract (4th Edition, 1987) in question contained conditions precedent which had to be complied with before commencing arbitration, including (among other things) a timely referral of the parties' dispute for determination by the engineer.

In following previous case law under the old UAE Arbitration Chapter,[246] the court held that it would not suffice for a party to refer the dispute to the engineer after commencing an arbitration, as that would undermine the purpose of the provisions (ie to save costs and preserve the parties' ongoing working relationship). Importantly, the court emphasised the principle of pacta sunt servanda applicable to conditions precedent for commencing arbitrations, and refused to rewrite the parties' multi-tier dispute resolution clause based on arguments of good faith under Article 246 of the UAE Civil Transactions Code.

In the circumstances, the claimant in this case had to bear the abortive arbitration costs and commence a fresh arbitration after complying with the condition precedent. This decision is a welcome indication of the Dubai courts' robust stance on enforcing compliance with contractual dispute resolution procedures, which is in line with the approach taken in other popular seats of arbitration such as Hong Kong, Singapore and the UK. The consideration of the relationship between the principle of pacta sunt servanda and the principle of good faith is particularly instructive.

Another interesting ruling relating to the UAE's Federal Arbitration Law can be found in *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*,[247] where the UAE Court of Cassation followed the previous case law under the old UAE Arbitration Chapter and required strict compliance with Article 41(3) of the Federal Arbitration Law (ie the requirement that both the reasoning and the dispositive parts of an arbitral award have to be signed), which is an essential detail of an arbitral award in the interest of public policy.

However, rather than nullifying the arbitral award under Article 53(2)(b) of the Federal Arbitration Law, the Court of Cassation decided to remit the award to the Dubai Court of Appeal in order for the irregularity in the form of the award to be rectified by the tribunal pursuant to Article 54(6) of Federal Arbitration Law (which is itself based on Article 34(4) of the UNCITRAL Model Law).

This is a pragmatic solution which avoids the nullification of arbitral awards for clerical or other formal errors, while emphasising the need to comply with the mandatory requirements of the Federal Arbitration Law. The arbitration community will undoubtedly welcome this helpful precedent, and it is encouraging to see the UAE courts adopting an increasingly sophisticated approach towards arbitration matters, which will in turn provide confidence to parties who are seeking a forum to resolve disputes arising from construction and engineering projects in the region.

Finally, it is worth turning our eyes briefly to the Appellate Division of the Civil and Commercial Court of the Qatar Financial Centre, which handed down an instructive judgment in March 2020 in the matter of *Leonardo SpA v Doha Bank Assurance Company LLC*.[248] The judicial panel consisted of Lord Thomas (former Lord Chief Justice

244 Case No 32/2019, Dubai Court of Appeal, 5 February 2020.
245 UAE Federal Law No 6 of 2018 on Arbitration.
246 See eg Case No 140/2007, Dubai Court of Cassation, 7 October 2007.
247 *Ali & Sons Marine Engineering Factory LLC v E-Marine FZC*, Case No 1083/2019, UAE Court of Cassation, 14 June 2020.
248 [2020] QIC (A) 1.

of England and Wales) and two senior barristers from England and Singapore respectively.

The case concerned the validity of a demand for payment made under performance and advance payment bonds, which were provided by Leonardo's sub-contractor (PAT Engineering Enterprises Co WLL) and subject to the Uniform Rules on Demand Guarantees 758 (URDG). These demands were rejected by the guarantor, and the parties were in dispute as to Leonardo's compliance with the documentary requirements, the scope of the guarantor's notice of rejection, and whether the amount called under the advance payment bond was excessive.

The Appellate Division started by stressing that "[t]he guarantor is only concerned with the issue of whether the documents presented conform with the terms and conditions of the guarantee and not whether the goods and services conform with the underlying contract".[249] This was to provide commercial certainty, and akin to the Uniform Commercial Practices (UCP), "... it is important URDG 758 is not interpreted in a literalistic manner or by adoption of rules of national law".[250]

In the event, the Appellate Division rejected the guarantor's argument that a written claim from Leonardo to PAT was necessary prior to making a demand under the bonds – they did not require a demand to be supported by copies of any claims made upon PAT, and so the requirement now of a written claim to PAT amounted to a non-documentary condition which should be disregarded by virtue of Article 7 of the URDG.[251]

Further, the Appellate Division held that the guarantor was in any event precluded from raising this issue now because this ground was not included in its notice of objection, bearing in mind that the rationale of Article 24 of the URDG (which requires a single notice of objection within five business days of the date of the demand) is to avoid piecemeal notification of objections in order to leave as little time as possible to cure the discrepancies before expiry.[252]

As for the guarantor's contention that the amount demanded was excessive (relying on an invoice submitted by PAT to Leonardo which was accepted as due), the bond required any such relevant invoice to be presented by PAT to the guarantor. The Appellate Division therefore held that it was not sufficient to show that the amount had been agreed as between Leonardo and PAT, as there had to be a presentation of the document specified to the guarantor. This was consistent with the principle that the guarantor was concerned with the documents presented in accordance with the bond and not the underlying position between Leonardo and PAT.[253]

> It is encouraging to see the UAE courts adopting an increasingly sophisticated approach towards arbitration matters, which will in turn provide confidence to parties who are seeking a forum to resolve disputes arising from construction and engineering projects in the region

Incidentally, the TCC in the UK has recently rendered a similar decision on an advance payment bond incorporating the URDG in *Tecnicas Reunidas Saudia for Services and Contracting Co Ltd v The Korea Development Bank*.[254] In that case, Waksman J observed obiter that an alleged condition requiring the advance payment to be paid by the beneficiary into a specific bank account was a non-documentary condition which should be disregarded under Article 7 of the URDG, such that it was in any event not a valid ground for refusing to make payment under the bond.[255]

The *Leonardo* decision therefore demonstrates that the Civil and Commercial Court of the Qatar Financial Centre, with the benefit of the expertise of experienced judges and legal practitioners from other established jurisdictions, is adhering to international practices when it comes to the interpretation of commercial instruments and international rules such as the URDG in construction and engineering disputes. This provides commercial certainty to parties and financial service providers operating in that region, and will no doubt promote the standing of the Qatar Financial Centre as yet another legal hub for cross-border dispute resolution.

249 Ibid, at para 35.
250 Ibid, at para 39.
251 Ibid, at paras 51 to 57.
252 Ibid, at para 65 to 72.
253 Ibid, at para 78.
254 [2020] EWHC 968 (TCC).
255 Ibid, at paras 48 to 64.

CONCLUDING OBSERVATIONS

Many are looking forward to putting 2020 and the calamitous effects of the Covid-19 pandemic behind them. The above overview of 2020 hopefully draws out some of the most intriguing industry and legal developments during what might otherwise be seen as an annus horribilis. At a time when the pandemic is far from fully resolved and much uncertainty remains as the new vaccines get rolled out gradually, it is important that we all take stock and constantly remind ourselves of the positive trends while bracing for changes at short notice, in order to continue to move forward as a community.

There will inevitably be ongoing efforts by the legal and construction industries to adapt their modus operandi to the restrictions caused by the pandemic, notably the continued emphasis on remote working arrangements and social distancing in the workplace. This will continue to have an impact on the way works and services are performed, as well as the manner in which justice is administered by the courts in all sorts of commercial disputes.

Employers, contractors, and construction professionals alike will need to keep abreast of updates to the UK Government and Public Health England's guidance on social distancing measures in the workplace, as well as any further revisions to the Construction Leadership Council's SOP. These changes will be informed by the growing body of knowledge and expertise about the mode and extent of transmission of the coronavirus, especially in light of the recent news of novel mutations.

Given the uncertainties around the potential impact of Covid-19 over the course of 2021, parties involved in construction and infrastructure projects will have to continue cooperating and coordinating their response, even if it means departing from and varying the black letter of the contract where necessary. Consideration needs to be given to the financial difficulties which continue to be faced by those in the industry, and parties should consider making use of the new solutions introduced by the Corporate Insolvency and Governance Act 2020 where practicable.

The silver lining is that the UK and the EU managed to agree a post-Brexit trade deal just before the new year, which has provided some relief to those in the industry who were concerned about currency depreciation and sudden shortages and price hikes in construction materials, in the event of a no-deal scenario. However, such cautious optimism needs to be grounded in an appreciation of some of the uncertainties which still remain, such as the absence of mutual recognition of professional qualifications for eg architects, and the potential effects of the implementation of the points-based immigration system on the construction workforce.

Apart from the foregoing, the year ahead also promises to be one of further evolution in the legal sphere. For instance, the Supreme Court's decision on the ongoing appeal in *Triple Point Technology Inc v PTT Public Company Ltd*[256] is likely to arrive in the first or second quarter of 2021, and it is set to provide some much-anticipated clarification on the principles applicable to the enforcement of liquidated damages in the event of the termination of a contract. Further, the main contract dispute arising from the Energy Works Hull project (which has already given rise to a lively body of TCC case law) will go to trial in June 2021, and judgment is likely to be handed down towards the end of the year or the early part of 2022, addressing a number of legal issues of wider interest.

> More than ever, it appears that change is the only constant when it comes to the construction and legal industries

Turning to the Grenfell Tower inquiry, which has already featured in previous reviews, the Phase 2 hearing has disclosed some shocking revelations in 2020 regarding the production, marketing and supply of the combustible insulation materials, the poor workmanship of the cladding installations, as well as the deficiencies of building control inspections. After the suspension of the Phase 2 hearings in December due to Covid-19 concerns, the hearing is set to continue in 2021, starting with the evidence of the manufacturer of the cladding panels (Arconic) in January.

The ongoing inquiry hearing and eventual Phase 2 report are likely to have a continuing impact on the industry's perception and practices regarding insulation and cladding materials in current and future projects, and everyone in the industry should keep watching this space. More substantively, the government has published the draft Building Safety Bill, which introduces direct

[256] See the Court of Appeal's decision in [2019] EWCA Civ 230; [2019] BLR 271.

accountability of various parties throughout the life of a building in response to the recommendations of Dame Judith Hackitt in her independent review.[257] The industry should stay tuned for the publication of the consultation responses, and it is expected that there will be significant political pressure on the UK Government to finalise the new legislation expeditiously.

Another area of potential legislative change is the widely discussed consultation on the effectiveness of the HGCRA (as amended). After some delay (possibly due to Brexit), the UK Government published the responses to the consultation in February 2020, which contained some interesting comments regarding (among other things) the lack of clarity of the payment framework, increasing costs of adjudications, the overall effectiveness of adjudication, and the continued existence of non-compliant contractual provisions such as "Tolent" clauses purporting to allocate adjudication costs and "pay when paid" clauses. It is unclear at the moment whether the UK Government intends to introduce a bill to address any of these issues, but with the Brexit negotiations out of the way (for now), there may be more developments on this front in the coming year.

In the meantime, the Construction Industry Council launched its Low Value Disputes Model Adjudication Procedure in May 2020,[258] which sets out a streamlined procedure and links the adjudicator's fees to the value of the claim. The aim is to make adjudication more affordable to SMEs where the amount in dispute is small, which was precisely one of the issues raised in the consultation responses on the HGCRA. This may well prove to be a timely solution, especially given the financial plights caused by the pandemic, but it remains to be seen whether this will become a popular option over the next year or two.

Finally, in relation to litigation in the Business and Property Courts, the Implementation Report of the Witness Evidence Working Group led by Popplewell LJ was published in 2020,[259] and a new CPR Practice Direction 57AC[260] and Appendix (Statement of Best Practice) were finally settled on 22 January 2021 and formally published on 1 February 2021. This was prompted by the courts' concerns about the tendency of parties in commercial disputes to adduce lengthy and detailed witness statements heavily based on documents, which often do not reflect the evidence in chief a witness would or could give orally. Incidentally, there have been striking examples in 2020 of witness statements in TCC matters which were found to be materially inaccurate and/or unreliable.[261]

The new Practice Direction will introduce further guidelines on the contents of witness statements and a new form of statement of truth. The Practice Direction also requires a witness statement to identify all documents which the witness has referred to or been referred to for the purpose of providing his/her written evidence. As this is intended to apply to TCC proceedings (except adjudication enforcement matters), parties and their legal representatives should familiarise themselves with the new Practice Direction and ensure that it is taken into account when drafting witness statements to be signed on or after 6 April 2021.

More than ever, it appears that change is the only constant when it comes to the construction and legal industries. This author is confident that these industries will continue to grow and thrive despite the various challenges in the coming days, just as they have always done so in the past. There is much to look forward to in the year ahead – in terms of legislative and judicial developments as well as improvements in the control of the pandemic. Until next year's review, let us all stay safe, keep calm, and carry on in this brave new world.

[257] Dame Judith Hackitt, *Building a Safer Future – Independent Review of Building Regulations and Fire Safety: Final Report*, Cm 9607, May 2018, assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707785/Building_a_Safer_Future_-_web.pdf.

[258] Construction Industry Council, *CIC Low Value Disputes Model Adjudication Procedure*, First Edition, May 2020, www.ciarb.org/media/12498/cic-low-value-disputes-model-adjudication-procedure-first-edition.pdf.

[259] See www.judiciary.uk/wp-content/uploads/2020/10/Working-Group-Implementation-Report.pdf.

[260] See www.judiciary.uk/wp-content/uploads/2020/10/CPR-PD57AC-Final-Draft-Updated-002.pdf.

[261] See eg *DBE*, at para 21 to 23 and *Essex*, at paras 6 to 34.

APPENDIX: JUDGMENTS ANALYSED AND CONSIDERED IN THIS REVIEW

2020 judgments analysed

2 Entertain Video Ltd and Others v Sony DADC Europe Ltd [2020] EWHC 972 (TCC); (2020) 37 BLM 06 4

Ali & Sons Marine Engineering Factory LLC v E-Marine FZC, Case No 1083/2019, UAE Court of Cassation, 14 June 2020

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

BBA and Others v BAZ and Another [2020] SGCA 53

Blackfriars Ltd, Re [2020] EWHC 845 (Ch)

Blackpool Borough Council v VolkerFitzpatrick Ltd and Others [2020] EWHC 1523 (TCC)

Bond Tak (Holdings) Ltd v King Fame Trading Ltd [2020] HKCFI 1509

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

Broseley London Ltd v Prime Asset Management Ltd [2020] EWHC 944 (TCC); (2020) 37 BLM 06 1

BRS v BRQ and Another [2020] SGCA 108

Case no 32/2019, Dubai Court of Appeal, 5 February 2020

CBP v CBS [2020] SGHC 23

China Machine New Energy Corp v January Energy Guatemala LLC [2020] SGCA 12

C Spencer Ltd v MW High Tech Projects UK Ltd [2020] EWCA Civ 331; [2020] BLR 364

Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Company Ltd and Others [2020] HKCFI 347

DBE Energy Ltd v Biogas Products Ltd [2020] EWHC 1232 (TCC)

Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd and Others [2020] EWHC 2537 (TCC); [2020] BLR 747

Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd [2020] EWHC 1626 (TCC); [2020] BLR 631

Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38; [2020] 2 Lloyd's Rep 449; (2020) CILL 4525

Essex County Council v UBB Waste (Essex) Ltd [2020] EWHC 1581 (TCC)

Flexidig Ltd v M&M Contractors (Europe) Ltd [2020] EWHC 847 (TCC)

Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) [2020] UKSC 48; [2021] BLR 1

ISG Construction Ltd v Platform Interior Solutions Ltd [2020] EWHC 1120 (TCC); [2020] BLR 525

John Doyle Construction Ltd v Erith Contractors Ltd [2020] EWHC 2451 (TCC); [2020] BLR 671

JRT Developments Ltd v TW Dixon (Developments) Ltd Unreported, HT-2020-BHM-000010, 8 October 2020

Lane End Developments Construction Ltd v Kingstone Civil Engineering Ltd [2020] EWHC 2338 (TCC); [2020] BLR 599

Leonardo SpA v Doha Bank Assurance Company LLC [2020] QIC (A) 1

Millchris Developments Ltd v Waters [2020] EWHC 1320 (TCC); (2020) 37 BLM 05 5

Muncipio De Mariana and Others v BHP Group plc [2020] EWHC 928 (TCC); [2020] BLR 421

MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd [2020] EWHC 1413 (TCC); (2020) 37 BLM 07 7

PBS Energo AS v Bester Generacion UK Ltd [2020] EWCA Civ 404; [2020] BLR 355

Platform Interior Solutions Ltd v ISG Construction Ltd [2020] EWHC 945 (TCC); (2020) CILL 4461

Rochford Construction Ltd v Kilhan Construction Ltd [2020] EWHC 941 (TCC)

RSK Environment Ltd v Hexagon Housing Association Ltd [2020] EWHC 2049 (TCC); (2020) 37 BLM 09 7

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

The Center (76) Ltd v Victory Serviced Office (HK) Ltd [2020] HKCFI 2881

The Financial Conduct Authority v Arch Insurance (UK) Ltd and Others [2020] EWHC 2448 (Comm); [2020] Lloyd's Rep IR 527

RGB Plastering Ltd v TAWE Drylining and Plastering Ltd [2020] EWHC 3028 (TCC); (2020) CILL 4564

Tecnicas Reunidas Saudia for Services and Contracting Co Ltd v The Korea Development Bank [2020] EWHC 968 (TCC)

Total Direct Énergie SA v Electricité de France SA, Case no 20/06689, Cour d'Appel de Paris, 28 July 2020

West Kowloon Cultural District Authority v AIG Insurance Hong Kong Ltd [2020] HKCFI 569; [2020] BLR 485

WRW Construction Ltd v Datblygau Davies Developments Ltd [2020] EWHC 1965 (TCC); [2020] BLR 623

Yuanda (UK) Company Ltd v Multiplex Construction Europe Ltd (formerly known as Brookfield Multiplex Construction Europe Ltd) and Another [2020] EWHC 468 (TCC); [2020] BLR 320

Judgments considered

AECOM Design Build Ltd v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC); [2017] BLR 329

Amec Civil Engineering Ltd v The Secretary of State for Transport [2004] EWHC 2339 (TCC)

Arnold v Britton [2015] UKSC 36; (2015) 32 BLM 07 6

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

Bennett (Construction) Ltd v CMC MBS Ltd (formerly Verbus Systems Ltd) [2019] EWCA Civ 1515; [2019] BLR 587

Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27; [2019] BLR Plus 20

Canary Wharf (BP4) T1 Ltd and Others v European Medicines Agency [2019] EWHC 335 (Ch)

Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358; [2006] BLR 15

Caledonia North Sea Ltd v British Telecommunications plc and Others [2002] UKHL 4; [2002] BLR 139

Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture [2010] EWHC 1076 (TCC); [2010] BLR 415

Croudace Construction Ltd v Cawoods Concrete Products Ltd (1978) 8 BLR 20

Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals and Polymers Ltd and Others [1999] BLR 41

Denton v TH White Ltd [2014] EWCA Civ 906; [2014] BLR 547

Engie Fabricom UK Ltd v MW High Tech Projects UK Ltd [2019] EWHC 1876 (TCC); [2019] BLR 514

Eurocom Ltd v Siemens plc [2014] EWHC 3710 (TCC); [2015] BLR 1

Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 227 (TCC); [2018] BLR 353

GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd [2010] EWHC 283 (TCC); [2010] BLR 377

Hadley and Others v Baxendale and Others [1854] EWHC Exch J70

Holding Savanna RCS SARL v 81-XXX SAS, Case no 15/12113, Cour d'Appel de Paris, 29 March 2016

Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] BLR 344

Lebeaupin v Richard Crispin & Co [1920] 2 KB 714

Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd and Others [1994] 1 AC 85; (1993) 63 BLR 1

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Another [2015] UKSC 72; (2016) CILL 3779

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 [2013] EWCA Civ 200; [2013] BLR 265

Millar's Machinery Co Ltd v David Way and Son (1935) 40 Com Cas 204

MT Højgaard AS v E.ON Climate and Renewables UK Robin Rigg East Ltd and Another [2017] UKSC 59; [2017] BLR 477

National Carriers Ltd v Panalpina (Northern) Ltd [1981] 1 AC 675

PBS Energo AS v Bester Generacion UK Ltd [2019] EWHC 996 (TCC); [2019] BLR 350

Premier Motorauctions Ltd and Another v Pricewaterhouse Coopers LLP and Another [2017] EWCA Civ 1872; [2018] Lloyd's Rep IR 123

Robinson v PE Jones (Contractors) Ltd [2011] EWCA Civ 9; [2011] BLR 206

S&T (UK) Ltd v Grove Developments [2018] EWCA Civ 2448; [2019] BLR 1

SG South Ltd v Kingshead Cirencester LLP and Another [2009] EWHC 2645 (TCC); [2010] BLR 47

Speymill Contracts Ltd v Baskind [2010] EWCA Civ 120; [2010] BLR 257

Star Polaris LLC v HHIC-PHIL Inc [2016] EWHC 2941 (Comm)

Stein v Blake [1996] 1 AC 243

Tennants (Lancashire) Ltd v CS Wilson & Co Ltd [1917] AC 495

The Financial Conduct Authority and Others v Arch Insurance UK Ltd and Others [2021] UKSC 1; [2021] Lloyd's Rep IR 63

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

Wimbledon Construction Company 2000 Ltd v Derek Vago [2005] EWHC 1086 (TCC); [2005] BLR 374

Yam Seng Pte Ltd v International Trade Corporation Ltd [2013] EWHC 111 (QB); [2013] 1 Lloyd's Rep 526

Ziggurat (Claremont Place) LLP v CC International Insurance Company plc [2017] EWHC 3286 (TCC); [2018] BLR 98