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Infra.Law

Spring 2021

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Welcome to the latest edition of our infrastructure publication, Infra.Law.

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Welcome to the Spring Edition of our construction and infrastructure publication, Infra.Law.

This edition looks at some of the wider issues facing the construction industry. Paul Henty, Rose Carey and Kelvin Tanner consider the impacts of the Brexit deal and its implications for the industry. David Savage, considers the availability of tax credits for the industry, whilst Fiona Edmond and Katherine Keenan look at the use of wood in structural frames as a way of reducing the industry's carbon footprint.

We also have commentary on important cases concerning the law governing arbitration agreements, the obligations of arbitrators to disclose potential conflicts of interest and the risks of assigning sub-contracts following termination of main contracts. Finally, Neil Coertse discusses conditional payment provisions and their enforceability in Middle East jurisdictions.

We hope you enjoy reading this edition of Infra. Law. Please do get in touch if you would like to discuss any of the issues covered or if there are any topics which you would like us to cover in future editions.

International arbitration – Which system of law applies?

A recent Supreme Court ruling clarifies how to determine which country's legal system should apply to an arbitration under an international construction contract

By Steven Carey, Partner, Head of Construction, Engineering & Projects

International construction contracts commonly provide for arbitration as the dispute resolution mechanism. Arbitration is perceived as potentially allowing for a tribunal with more industry expertise (and potentially more independence) than the local courts.

But which system of law governs the arbitration agreement, in particular, its validity and scope? The Supreme Court's recent decision in *Enka vs Chubb* has brought some certainty in English law on this tricky question.

Background

In June 2012 Enka was employed as a subcontractor in the construction of a power plant in Russia. Russian law governed the subcontract (albeit there was no express governing law clause). Importantly, while the subcontract provided for disputes to be resolved by arbitration, it failed to specify the law governing the arbitration. However, it did state that "the place of arbitration shall be London, England".

Following a fire in February 2016, which left the power plant severely damaged, Chubb, as the owner's insurer, paid out around $400,000,000. Chubb brought subrogated proceedings against Enka in Russia alleging liability for the fire.

Enka subsequently issued separate proceedings in England, seeking an order that Chubb discontinue the Russian proceedings as the dispute was subject to the arbitration agreement in the subcontract.

Arbitration provisions in international contracts such as these are treated as, in effect, a contract within a contract. This raises the possibility of three systems of law coming into play. Firstly, the law governing the dispute under the contract, secondly the law governing the arbitration agreement, and thirdly the law governing the arbitral process. The latter is often referred as the law of the "seat" of the arbitration and is the law governing procedural issues such as rights of appeal, and so on.

The importance of which law governed how the arbitration agreement should be construed was that Chubb argued that if it was Russian law, the claim it was pursuing fell outside the scope of the arbitration agreement and so the Russian courts could determine it.

The Supreme Court held (by a majority) that as the contract and the arbitration agreement within it contained no choice of law clause, the validity and scope of the arbitration agreement was governed by the law of the chosen seat of arbitration (English law) rather than the law that governed the contract (Russian law). It therefore upheld Enka's injunction restraining Chubb from proceeding against Enka in Russia.

Governing principles

In making this decision, the Supreme Court set a number of principles regarding the determination of the governing law applicable to arbitration agreements:

- The law applicable to the arbitration agreement may be different from that which governs the other parts of the contract.
- The law applicable to an arbitration agreement will be either the law chosen by the parties, or in the absence of such a choice, the system of law with which the arbitration agreement is most closely connected.
- Where there is no express choice of law to govern the arbitration agreement, an express choice of law governing the contract to which the arbitration agreement forms part will generally apply.
- The choice of a different country as the seat of the arbitration is not (by itself) sufficient to negate an inference that a choice of law to govern the contract was intended to apply to the arbitration agreement.
- However, there are factors which may negate such an inference and imply that the arbitration agreement was intended to be governed by the law of the seat of the arbitration, such as: any provision of the law of the seat which indicates that, where an arbitration is subject to that law, the arbitration agreement will also be treated as governed by that country's law; the existence of a serious risk that, if governed by the same law as the contract, the arbitration agreement would be ineffective; or if there is evidence that the seat was deliberately chosen as a neutral forum for the arbitration.
- Where there is no express choice of law to govern the contract, a clause providing for arbitration in a particular place does not by itself mean that the contract (or the arbitration agreement) is intended to be governed by the law of that place.
- In the absence of any express choice of law to govern the contract or the arbitration agreement, the arbitration agreement shall be governed by the law with which it is most closely connected. If the parties have chosen a seat of arbitration, this will generally be the law of that seat, even if this differs from the law applicable to the parties' substantive contractual obligations.

Despite the clarity that this decision brings to the principles governing which system of law governs an arbitration agreement, it also serves to emphasise the importance of expressly addressing these points in the contract and the arbitration agreement. Otherwise, significant amounts of money can be spent arguing about what is the most appropriate forum to determine the dispute – unless of course you like spending time in the Russian courts.

This article was first published by 'Building' on 30 November 2020 and is reproduced with their kind permission.

'Subject to contract' – The effect of these words in settlement negotiations

In the recent case of *Joanne Properties Limited v Moneything Capital Limited and another* [2020] EWCA Civ 1541, the Court of Appeal overturned the original court's decision that a binding agreement had been formed despite communications being 'subject to contract'. Although not a surprising decision, it serves as a reminder of the effect and significance of labelling communications 'subject to contract'.

By Eveline Strecker, Knowledge Development Lawyer, Construction, Engineering & Projects
Anna Sowerby, Trainee Solicitor, Real Estate

Background

Joanne Properties Limited (**Joanne**) borrowed money from Moneything Capital Limited (**Moneything**), secured by a legal charge over Joanne's property in Wandsworth. Joanne later fell into arrears and Moneything appointed receivers to recover the loan.

Joanne contested the appointment of the receiver and sought an injunction against the receivers to prevent them from taking further recovery steps.

The parties compromised the application for the injunction. They agreed the property would be sold and an order made for distribution of the proceeds.

A sum of £140,000 was to be 'ring-fenced' and paid to either party subject to terms which the parties were still to resolve. The fact that this sum was to be ring-fenced was agreed in a formal contract signed by both parties. The parties entered into negotiations as to how the ring-fenced sum was to be distributed.

Was there a binding agreement?

The issue in this case was whether a binding agreement had in fact been reached between the parties with regards to the distribution of the ring-fenced sum of £140,000. The issue arose due to the parties' use of the 'subject to contract' label.

Save for a purported Part 36 settlement offer (a formal written offer which can have consequences in relation to legal costs), all communications between the parties' solicitors included the reference 'without prejudice and subject to contract' or similar words. Towards the end of the communications, Joanne changed legal representatives. Moneything's solicitors sent Joanne's new solicitors a draft consent order addressing the dispersal of the £140,000 on terms that had not been agreed. Moneything's solicitors said they would apply to the court for an order in those terms and proceeded to do so.

Joanne commenced proceedings arguing that no binding agreement had been reached, as the negotiations were all 'subject to contract'.

First instance court's decision

At first instance, the court held that there was a binding agreement between the parties for a number of reasons, including:

- The correspondence between the parties was for full and final settlement and not for partial settlement;
- There was no mention of any further terms of the agreement in the correspondence; and
- There were administrative points to agree but nothing material to the terms for settlement purposes.

Joanne appealed the decision to the Court of Appeal.

Court of Appeal decision

The court emphasised that 'subject to contract' is a well-known label used in legal negotiations and the question whether two persons intend to be legally bound is to be decided objectively.

Lewison LJ cited *Sherbrooke v Dipple* (1981) where it was held that once negotiations have begun 'subject to contract', all subsequent negotiations would be subject to this condition, unless both parties expressly or by implication agreed that it should not apply. It was not for the parties to assume that negotiations would continue until they became binding and the 'subject to contract' qualification ceased to have effect or was replaced by a new contract. It was also not for the court to impose a binding contract on the parties which they had not reached. The question of whether a binding contract has been entered into will depend on the circumstances in each case.

In this case, Lewison LJ stated, "*there was undoubtedly no express agreement that the 'subject to contract' qualification should be expunged.*" This could also not be implied as the previous offers had been headed 'subject to contract' and it was contemplated that a consent order would be necessary to embody the parties' compromise. This was the position with the earlier settlement agreement, which had been negotiated and embodied in a formal written contract. When conducting negotiations to settle litigation, which are 'subject to contract', the consent order is the equivalent of the formal contract. The parties must agree the terms for the 'subject to contract' label to fall away.

Moneything's solicitors argued that when the Part 36 offer was made, it essentially reset the discussions so that the parties then proceeded on the basis of offers and counter-offers capable of being accepted. Lewison LJ clarified that Part 36 offers are separate from ordinary offers under the law of contract and run parallel to any 'without prejudice' or 'subject to contract' negotiations. The Part 36 offer is essentially a free-standing offer, and does not re-set the settlement attempts taking place in parallel. The court emphasised that even if the Part 36 offer did reset the status of the 'subject to contract' label, the parties' subsequent communications re-introduced the 'subject to contract' status.

Going forward

This was not a surprising decision from the Court of Appeal, but it highlights the effect of using the 'subject to contract' label during settlement negotiations and communications. Identifying communications in the course of ongoing negotiations as 'subject to contract' means that neither party intends to be bound (legally or equitably) unless and until a formal agreement has been reached or it can be clearly inferred from the facts in the particular case that the parties intended that the 'subject to contract' qualification should no longer apply. Until then, each party has the right to withdraw.

Parties in the course of settlement or other negotiations would be wise to include the 'subject to contract' label once it has been introduced into negotiations, until such time that both parties are ready to be bound by a formal agreement.

Haliburton v Chubb: The final say on an arbitrator's duty of disclosure

An arbitrator's independence and impartiality are among the foundations of arbitration. The recent Supreme Court case of *Haliburton v Chubb* clarifies the English law position on:

- the arbitrator's duty to disclose their appointments and involvement in other arbitrations;
- whether and when disclosure is needed; and
- whether the test under section 24 of the UK Arbitration Act (application to remove an arbitrator due to doubts as to impartiality) is the same as the common law test of bias.

The case is of significance for the wider international arbitration community and a significant number of arbitral institutions, namely the LCIA, ICC, CIArb, LMAA and GAFTA, were given permission by the Court to intervene given the importance of the issue.

By Sara Cunningham, Construction, Engineering & Projects

Background

This case concerned an arbitration under a Bermuda Form liability policy which arose out of the damage caused by the explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico in 2010. That disaster gave rise to several arbitrations between insured parties and insurers.

The Bermuda Form policy contained a standard arbitration clause which provided for arbitration in London by a tribunal of three arbitrators, one appointed by each party and the third appointed by the two arbitrators. If the party-appointed arbitrators could not agree on the appointment of the third arbitrator, the High Court in London was to make the appointment.

Haliburton and Chubb each appointed one arbitrator. The appointed arbitrators could not agree on the appointment of the third arbitrator as chairman. As a result, the High Court appointed Mr Rokison, who was one of the arbitrators whom Chubb had proposed to the court, as the third arbitrator. Halliburton did not appeal against that order.

Before Mr Rokison's appointment, he disclosed to Halliburton and the court that he had previously acted as an arbitrator in several arbitrations in which Chubb was a party, and that he was currently appointed as arbitrator in two pending references in which Chubb was involved.

However, following his appointment as chair, Mr Rokison accepted two further appointments as an arbitrator in relation to claims arising out of the Deepwater Horizon disaster. In one of those arbitrations Mr Rokison was appointed by Chubb. In the other arbitration, to which neither Chubb nor Haliburton were parties, Mr Rokison was appointed as a substitute arbitrator.

Mr Rokison did not disclose either of these appointments to Halliburton. When Halliburton discovered these appointments, it brought a claim under section 24(1) *Arbitration Act 1996*, requesting that the court remove Mr Rokison due to justifiable doubts as to his impartiality and apparent bias. The omission of these disclosures was central to Halliburton's claim.

The Supreme Court upheld the decisions of both the High Court and Court of Appeal finding there was no apparent bias and therefore no grounds for removing the arbitrator. However, it also found that Mr Rokison had breached his legal duty of disclosure.

We consider some of the key points made in the judgment and the guidance provided by the Supreme Court below.

Duty of impartiality

Impartiality is a "cardinal duty" of an arbitrator. The Supreme Court reaffirmed the common law test for apparent bias as "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (Porter v Magill* [2001]). This was the same test under section 24 of the Arbitration Act i.e. where there is an application to remove an adjudicator in circumstances which give rise to justifiable doubts as to impartiality.

The Supreme Court held that the test should also have regard to the characteristics of international arbitration which highlights the importance of proper disclosure and transparency of arbitrations as a means of maintaining the integrity of international arbitration.

Duty of Disclosure

The Supreme Court held that there is a legal duty of disclosure in English law arising as part of an arbitrator's duty to act fairly and impartially under section 33 of the Arbitration Act. This is an objective test and an arbitrator is under a duty to disclose facts and circumstances which would or might reasonably give rise to the appearance of bias.

Although there is a seeming tension between an arbitrator's duty to disclose and their obligation of privacy and confidentiality, the Supreme Court considered that as a general rule, the duty of privacy and confidentiality would not preclude disclosure of the existence of a related arbitration in the absence of express consent. However, the duty does not give an arbitrator "carte blanche" to disclose whatever he thinks is necessary to parties not a party to the arbitration.

If an arbitrator needs to disclose additional details, other than the name of the common party or that the arbitration relates to the same facts, the arbitrator must obtain the consent of the parties to the arbitration about which he or she is making a disclosure.

Does a failure to make a disclosure demonstrate a lack of impartiality?

The Supreme Court held that failure to disclose multiple references in the same subject matter or appointments by the same party is capable of demonstrating "*a lack of regard to the interests of the non-common party*" and may in certain circumstances constitute apparent bias.

The time of the assessment of the need for disclosure

A duty of disclosure is a continuing duty. When assessing whether there should have been a disclosure, a court must have regard to the circumstances at the time when the arbitrator acquired the relevant knowledge of those circumstances. The Court said when determining whether there was a need for disclosure, the question should not be "*answered retrospectively by reference to matters known to the fair-minded and informed observer only at a later date.*"

The time of assessment of the possibility of bias

The Supreme Court confirmed that the correct time to apply the test for apparent bias was by asking whether, at the time of the hearing for an application to remove an arbitrator, " *the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias.*"

Conditional payment clauses in the UK and Middle East

Managing and securing the cash flow of any business enterprise is of paramount importance, and contracting parties in the construction industry are no exception to this. If regular cashflow from the main contractor to its subcontractors and the supply chain is disrupted, parties to the project may soon find themselves in difficulty. The purpose of a conditional payment clause is to help a main contractor guard against a cash flow "crunch" by making the downstream payment obligation conditional on receipt of payment from the upstream party.

Conditional payment provisions, stipulating that payment can be made only "when" or even "if" the main contractor is paid or upon the occurrence of certain events or actions, are prohibited in the UK and various other jurisdictions around the world, including New Zealand, Malaysia, and certain provinces/states in Canada, Australia and the USA. However, in some jurisdictions, particularly in the Middle East, "pay **when** paid" and even "pay **if** paid" provisions play a significant part in allocating risk on construction projects. In the Middle East, such payment clauses remain enforceable, though parties need to be aware of how the respective Civil Codes in the region affect their operation.

By Niel Coertse, Construction, Engineering & Projects

Forms of conditional payment clauses

Conditional payment clauses can take many forms.

A "pay **when** paid" clause defers **timing** of the payment. However, the main contractor retains the risk of non-payment by the employer. Consequently, while a main contractor may invoke a "pay **when** paid" clause it is not able to do so indefinitely.

A "pay **if** paid" clause makes payment contingent on the main contractor receiving payment from the employer. The risk of non-payment by the employer is transferred to the subcontractor.

UK: prohibition on conditional payments

For construction contracts that fall within the ambit of the Construction Act 1996, section 113(1) provides that any term making payment under the contract conditional on the payer receiving payment from a third person is ineffective.

In addition, section 110 of the Construction Act 1996 provides that every construction contract is required to contain an "adequate mechanism" for determining what and when payments are due. In respect of conditional payment terms, section 110(1A), which took effect in England and Wales for construction contracts dated on or after 1 October 2011, provides:

> *"(1A) The requirement... to provide an adequate mechanism for determining what payments become due under the contract, **or when**, is* **not satisfied** *where a construction contract makes payment **conditional on***
>
> *(a) the performance of obligations under **another contract**, or*
>
> *(b) a decision by any person as to whether obligations under another contract have been performed."*

This was intended to prohibit *"pay-when-certified"* clauses, which were being used as a way to avoid the prohibition on "pay-when-paid" provisions. An example of this type of clause is where payment to a sub-contractor under its sub-contract is conditional on the main contractor's application for payment under the main

contract having been certified for payment by the employer.

If or to the extent that a contract contains a non-compliant payment mechanism, the relevant provisions of Part II of the amended *Scheme for Construction Contracts (England and Wales) Regulations 1998* will replace the offending payment terms (section 110(3)).

Main contractors are therefore prevented by statute in the UK from transferring the risk of non-payment from the employer onto a subcontractor. A notable exception from the prohibition on "pay when paid" provision is in respect of *upstream insolvency*.

The Middle East: conditional payment clauses

In contrast, main contractors in regions such as the Middle East are free to agree that the payment terms in their subcontracts operate "back to back" with the payment terms they have agreed with the employer, although the statutory codes of the different jurisdictions play an important role in supervising the operation of conditional payment clauses.

A cornerstone of all Civil Codes in the Middle East is that the contracting parties have an explicit obligation to conduct themselves in a manner that is consistent with principles of good faith in the performance of a contract.

Moreover, the subject matter of a contract must have a valid cause, in the sense of a purpose or motive, and must not conflict with public order, decency or laws passed for the public interest. Areas of public interest include marriage, inheritance and lineage, systems of government, freedom of trade, circulation of wealth, rules of private ownership and "the other rules and foundations upon which society is based", as noted in Bahrain's Civil Code.

Practical implications

Examining the mechanics of conditional payment clauses there are a number of aspects parties need to bear in mind:

Loss of protection

In the Middle East, the main contractor should be aware that if it fails to pursue payment on behalf of the subcontractor, it may lose back-to-back protection and leave itself open to a claim from the subcontractor. The main contractor may then find itself in the position of having to pay the subcontractor "from its own pocket" before pursuing the claim separately against the employer.

When is when?

According to Article 428 of the UAE Civil Code, a condition must be observed as far as is possible. However, a typical question in respect of "pay when paid" clauses is "when is 'when'" under the subcontract? For example, is the subcontractor entitled to payment only upon project handover, or when the subcontract works are handed over?

Dubai Court of Cassation Case No. 281 of 1995 (dated 6 July 1996) considered the effect of a "back-to-back" conditional payment provision. Here, a main contractor resisted a subcontractor's claim for the balance of the subcontract price, relying on a conditional payment clause which made payment conditional upon receipt of payment from the employer.

The Court found that the subcontractor was only entitled to a proportional payment during the "performance period" from any payment received by the main contractor. However, the position changed when the subcontractor completed all of its work and delivered the subcontract works to the main contractor. At this point all payments became due and the subcontractor did not have to wait for payment until such time that the main contractor was paid. The main contractor was not entitled to suspend payment indefinitely.

The Court affirmed that conditional payment clauses are subject to general principles of contract which require the court to have regard to the "meaning and intention, not mere words". The Court further noted that the contract provisions have to be interpreted in such a way so as to achieve the common interests of the parties and not to give undue weight to the interest of one party over the other. To require the subcontractor to wait for payment beyond the handover of the project, or to be penalised for problems that it may not have caused, would be incompatible with these principles.

Possible remedies or solutions

In the event of non-payment, the subcontractor may have a right to suspend its works under local laws, for example, in the UAE pursuant to Article 247 of the UAE Civil Code. However, the subcontractor needs to ensure that it has complied with its performance obligations. If the employer's payment obligations are "back to back" with the main contract, the subcontractor may still be dependent on the main contractor being in a similar position vis-à-vis the employer before a domestic court will consider the question of whether the subcontractor's actions were proportionate in the circumstances.

Going forward

While prohibited in certain jurisdictions, conditional payment provisions continue to play an important part in allocating risk on construction projects around the world, particularly in regions such as the Middle East. This a commercial reality many are willing to agree to in order to do business. Yet all parties on a project need to be acutely aware of exactly how such provisions operate under the particular law governing the agreements they sign up to.

It was the famous English judge, Lord Denning who first coined the axiom that cash flow represents "the very lifeblood of the enterprise" and it remains a truism on construction projects the world over. Parties ignore conditional payment clauses at their peril.

This article by Niel Coertse was first published as a blog by Practical Law Company on 19 January 2021.

The UK's post-Brexit rules for skilled workers – Key implications for the construction industry

The end of the post-Brexit transition period brings challenges for the construction industry in many areas, not least concerns over the continued ability to source and recruit sufficient labour. Following the end of free movement, the UK's new Points Based Immigration System applies to EU and non-EU citizens alike. Minimum skills thresholds apply and so UK companies no longer have the unlimited access to EU workers to fill lower-skilled roles. Crucially for the construction sector, this means that it is not possible to sponsor labourers under the new rules as the role is not considered skilled enough for sponsorship. However, at the same time, the overall skills threshold has been reduced, opening up a wide range of other construction-related roles now eligible for sponsorship.

By Rose Carey, Partner, Immigration
Kelvin Tanner, Partner, Immigration

Reduction in skill level – Key benefits for the construction industry

Under the previous system, typical construction-related occupations for which companies were able to sponsor migrants included: construction managers and directors; project managers in construction and building engineers. Under the new system it is still possible to sponsor migrants under these roles, but it is now also possible to sponsor migrants for the following 'lower skilled' roles for the first time: building services consultants; construction planners; and construction foremen and supervisors. Sponsorship is also now possible for carpenters, welders and electricians.

The Supreme Court upheld the decisions of both the High Court and Court of Appeal finding there was no apparent bias and therefore no grounds for removing the arbitrator. However, it also found that Mr Rokison had breached his legal duty of disclosure.

We consider some of the key points made in the judgment and the guidance provided by the Supreme Court below.

EU nationals already residing in the UK before the end of the transitional period

EU nationals residing in the UK for more than 5 years as at 31 December 2020 will be able to apply for 'settled status' (permanent residency) under the existing EU Settlement Scheme (EUSS) until 30 June 2021. Those who were residing in the UK as at 31 December 2020, but for less than 5 years, can also use the EUSS to obtain 'pre-settled' status with the option to apply for settled status at the five year mark, provided they meet the residency requirements – typically not being outside of the UK for more than six months in each of the five qualifying years, unless one of a number of limited exemptions applies.

New EU arrivals to the UK

EU nationals arriving into the UK for the first time from 1 January 2021 for the purposes of work will require a work visa and sponsorship under the new immigration system for the very first time.

Sponsoring workers under the new system

The previous Tier 2 (General) category for skilled workers with a job offer in the UK has transitioned into the new 'Skilled Worker' route. Tier 2 (Intra-Company Transfer) categories for existing employees of linked overseas entities are now known simply as the 'Intra-Company routes'.

The requirement for employers to hold a sponsorship licence, with its associated compliance duties, remains an integral part of the new system.

The 'Skilled Worker' route - some further positive developments

The annual cap on skilled workers entering the UK has been suspended. This means that, for the time being at least, there will no longer be a limit on the number of migrant workers who can come to the UK under this category each year.

In welcome news for all business sectors, the requirement to advertise a role in a Home Office prescribed manner and showing that no suitably qualified settled worker could be found before sponsorship was possible (known as the 'Resident Labour Market Test '), has been abolished. However, sponsors still need to demonstrate a genuine need for the role in question and that the migrant they wish to sponsor has the necessary skills, qualifications and experience required for the role in question.

The overall minimum salary threshold has been also reduced, although the role will still need to meet the 'going rate' for the relevant job, if higher. Finally, the 'cooling off' period no longer applies and it is easier to switch into this route from within the UK.

Conclusion and the future

Whilst construction companies can continue to freely employ EU nationals already in the UK, who have registered under the EUSS, or are eligible to apply before the deadline, meeting future labour needs may inevitably become more difficult as the new rules start to really kick in. The UK currently has no designated route for lower skilled workers other than for those working for the agricultural sector and, even then, the category remains under review.

Employers will need to budget for the increased costs of sponsoring EU as well as non-EU migrants and the cost of sponsoring can be high. Those without a sponsor licence will need to apply for one if they want to sponsor EU migrants going forward, assuming the role is eligible. The minimum salary requirement for sponsorship under the relevant job type must also be met. EU migrants may become eligible for a Youth Mobility visa in due course, which enables nationals of certain countries aged 30 or under to obtain a two year visa permitting them to work for any employer in the UK. This route doesn't currently incorporate EU nationals, but may do so in the future. This will depend on the result of on-going trade talks with the EU.

What does the Brexit Deal mean for the Construction Industry? Still some serious snagging issues

After the perils and uncertainties of 2020, many have been hoping for a smoother passage through 2021. Hopes were bolstered in late December 2020 with news that the UK Government had at the eleventh hour hammered out a Trade and Co-operation Agreement (TCA) with the European Union, following an arduous negotiation process, which had been made even more difficult by the COVID-19 crisis.

News of agreement of the TCA eased concerns round the possible adverse effects of a "no deal" scenario at the end of the "Transition Period" under the EU-UK Withdrawal Agreement. This raised the possibility of cross-border trade being complicated with tariff and non-tariff barriers, adding cost, delay and complication. Businesses had been engaged in preparations for a "no deal" only to discover that the Government had averted this at the eleventh hour.

The construction sector – already impacted by the effects of the COVID crisis - stood to be particularly badly hit by the prospect of a "No deal" Brexit. In this article, we have therefore reviewed the extent to which the industry's main concerns have been addressed by the TCA and map out some actions businesses may still need to take. A key take-away is that for all the positive aspects of the TCA, construction firms still may have work to do to make sure their operations run smoothly in the post-Brexit era.

By Paul Henty, Partner, Construction, Engineering & Projects

Concern 1: Free movement and cost of construction materials and products

What is the concern? UK businesses have come to rely upon the free movement of construction materials and products between EU Member States. Goods move across frontiers without the imposition of tariffs or customs formalities. It is estimated by the Construction Leadership Council that around 22% of all materials, products and components are sourced from abroad by UK construction businesses. "No deal" would pose a risk of concern of disruption with trade flows. The imposition of tariffs could not only lead to unforeseen costs but also disagreements between employers and contractors as to who should bear those.

Has the TCA addressed the concern? The TCA has ensured that there will be no tariffs or quotas on goods moving between the EU and UK, provided rules of origin are satisfied in relation to the goods. However, customs declarations need to be made when importing or exporting goods. In addition, there could be possible delays at customs owing in part to the COVID-19 crisis.

There had been concern that the need for customs declarations could slow cross-border freight. As at early January 2021, this new requirement does not appear to have created gridlock at major ports, although the Port of Dover has warned that this time of year is traditionally a slow time for freight, so the worst could still be to come.

What should businesses do? Businesses who rely on imported materials – whether directly or through a third party – still need to gauge whether there will be delays in the arrival of those products. They should talk to suppliers about possible delays to deliveries and consider the knock-on effect this may have for delivery requirements under contracts. If there is a likelihood of disruption, discussions should be held in advance with employers or clients in order to manage expectations or potentially agree variations (e.g. amendments to milestone dates) where appropriate. Businesses may also want to consider the effect and potential applicability of force majeure clauses. For EU imports, it may be possible to defer making customs

declarations under a scheme announced by the HMRC, which may help speed up the logistical process. Businesses should also check goods will satisfy the relevant "rules of origin" which entitle them to tariff free treatment under the TCA.

Concern 2: Standards and regulation

What is the concern? The EU single market is characterised by harmonised regulatory standards and mutual recognition of standards in many areas, which contributes to frictionless trade. The UK leaving this behind raises the risk of inconsistency between the two trading blocs and the general lowering of standards, as well as increased bureaucracy for businesses.

While the UK was an EU Member State, the *EU Construction Products Regulation 305/2011* ("the CPR") had the effect of removing technical barriers to the trade of construction products between the UK and the European single market. The CPR includes, for example, obligations for products to carry the "CE" mark – a common quality and safety mark for products which allows them to be marketed and sold freely throughout the EU.

Now that the UK has left the EU single market, there is no single "CE" mark used across the UK territory and EU. There are instead three different types of product marking that may be needed, depending on where the product is intended to be used:

- The EU's marking for product conformity **(CE marking)**
- The United Kingdom Conformity Assessed mark **(UKCA mark)**
- The United Kingdom Northern Ireland mark **(UK(NI) mark)**, which is additional to the CE marking in some instances.

In order to apply and use the relevant mark lawfully, the manufacturer may need to engage the services of a conformity assessment body as part of the demonstration of conformity. These assessments are carried out by organisations recognised within the specific jurisdiction.

Businesses must also check whether, for the purposes of the legal rules on conformity marking, they fall within the definition of "importer" for the purpose of the relevant regulations. That could be a point that is too easily missed. The "importer" is the party which is deemed to have first brought the good into the UK and to have placed it on the market here.

"Placing on the market" can take place with a simple transfer of ownership from one entity to another. It does not necessarily involve selling the goods on.

If you are the "importer", you must fulfil a number of requirements, such as ensuring your company's details and a contact address appear on the label of the product or in certain cases up to 1 January 2022, in the accompanying documentation instead (which may be easier).

Has the TCA addressed this concern?
The TCA does not provide for mutual recognition of products or standards in the same way as existed while the UK was in the EU. However, the UK Government has already introduced laws *(the Construction Products Materials Regulations 2019 and 2020)* which lessen the impact of the UK leaving behind the EU single market regulatory regime.

The UK has now introduced the UKCA mark which will eventually replace the "CE" marking for goods sold on the UK market. However, this new regime (and the introduction new UKCA mark) does not prevent the sale or use in the UK of CE marked materials straight away. Most imported goods which already carried a

valid CE mark as at 31 December 2020 can still legally be used in the UK until 31 January 2022. The UKCA will not be recognised for products exported to the EU so any goods exported to the EU must still meet the CE criteria and carry the CE mark. The requirements to reference the UK importer on labels or product documentation are however now in force, as mentioned above.

What can businesses do? The rules are complex and need to be reviewed carefully. First and foremost, businesses need to check their product marking, as well as whether they are the designated "importer". Most CE marked goods may still be sold lawfully in the UK until the end of 2021. However, there are certain exceptions and you should check your materials do not come within any of these. Also remember that the new rules requiring the identification of the UK importer, either on the label or in accompanying product documentation are now in force and must be complied with. During the course of 2021, businesses dealing in materials may need to get ready to transition to using products used or sold which carry the new UKCA marking by 2022. If businesses have EU suppliers, they should ensure that their suppliers are ready for this change. For goods and materials imported from the EU, businesses must ensure any products or components they use will require a third party conformity assessment by an approved body in order to continue to be used within the UK.

Concern 3: Workforce and access to labour

What is the concern? The construction industry has benefited from the free movement of labour from the other EU member states. Many skilled and unskilled workers have opted to move here to work on construction projects. Although many businesses consider that labour costs have been too high for some time, EU free movement may have helped mitigate the problem. Many construction and engineering firms have been fearful of a possible skill shortage which may inflate costs and hamper the ability of the industry to deliver projects on time and to budget or even mean certain projects become unaffordable.

For more information on this issue for the construction industry please see The UK's post-Brexit rules for skilled workers – Key implications for the construction industry and our update Brexit: Implications for Immigration

Concern 4: Public procurement and project opportunities

What is the concern? The EU rules on public procurement require projects procured by public entities to be advertised and subject to a competitive tender process. Interested parties across the EU and European Economic Area, as well as those established in one of the signatory states of the WTO Government Procurement Agreement ("GPA") must be able to tender. The EU rules on public procurement open opportunities for construction firms across the continent. Leaving the EU created a risk of UK firms being excluded from EU based project opportunities (such as in relation to infrastructure).

The concern relating to market access has been partially mitigated by the UK's entry into the GPA in December 2020. The GPA is a plurilateral agreement between 20 signatories, including 19 states globally and the European Union (which signed on behalf of its 27 member states). The purpose of the GPA is to ensure that governments allow public procurement opportunities are opened up to businesses from each other's states. The GPA covers most (but not all) project types covered by the EU rules on procurement. Some, however, are not included (such as defence projects and contracts awarded by utility bodies).

Has the TCA addressed this concern? The TCA largely confirms that the EU and UK will guarantee each other a framework of transparent and competitive procurement along the lines set out in the GPA. The UK and EU have also agreed an extension of market access coverage to include projects that are not included within the GPA. These additional project types include opportunities in the gas and heat distribution sector; contracts awarded by private utilities that act as a monopoly (e.g. ports); and contracts for a range of additional services in the hospitality, telecoms, real estate and education sectors. Notably, however, defence appears to have been left out of this scope. That is perhaps not surprising given the often sensitive nature of many defence projects.

What should businesses do? The TCA provisions on public procurement are helpful to construction and engineering businesses. However, UK firms competing for contract opportunities overseas should still check whether the types of procurement that interest them are included in the coverage of the TCA or GPA. If they are not, there is a risk public bodies in the EU will not allow them to compete for future tenders for that project type. If such a risk exists, a practical solution for a UK business may be to establish an EU based subsidiary or to bid alongside EU based consortium partners.

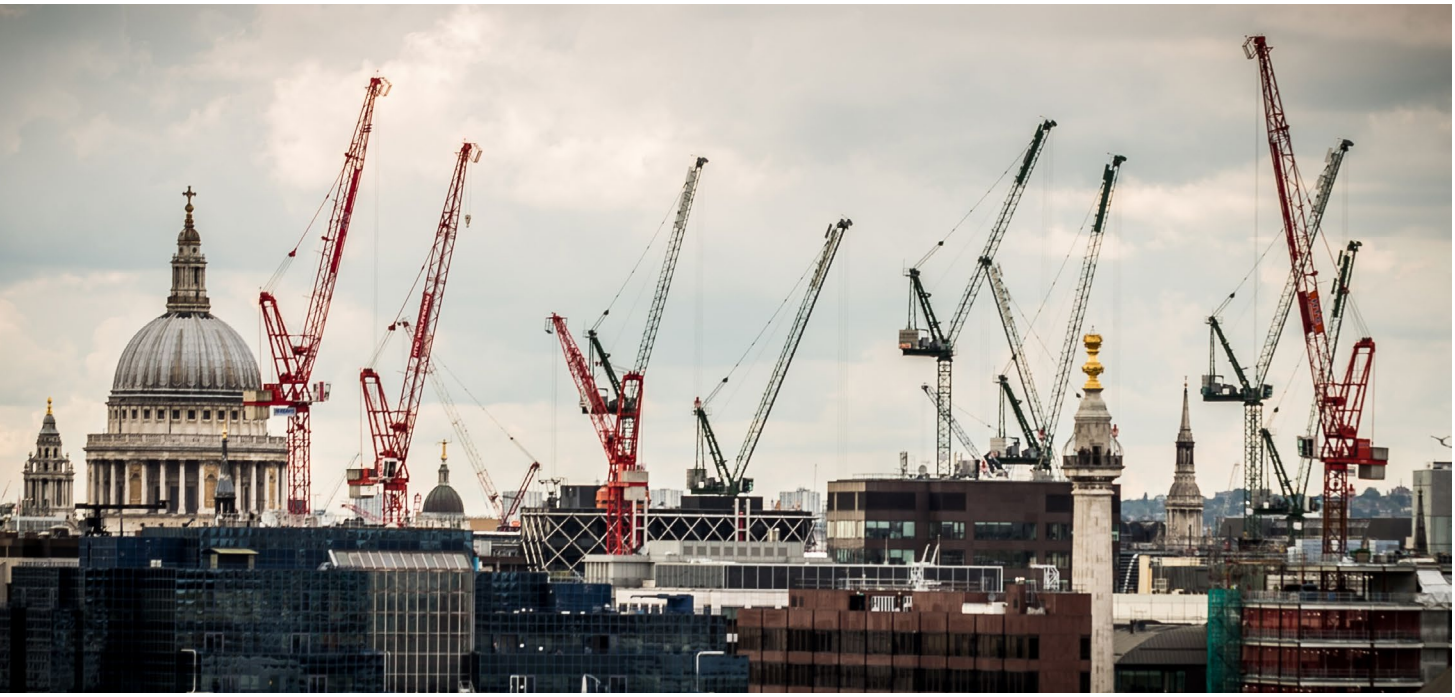
Also remember that the procuring authority may still choose to allow participation from non-EU bidders even when not required to do so. It may therefore be worthwhile expressing interest in working with the body concerned and reminding them of the benefits of widening competition as widely as possible.

Conclusions

Whilst the TCA will head off some of the more serious concerns regarding a no deal scenario, it has not removed every complication, nor has it relieved businesses of the need to consider the impact of Brexit on their business. Even though the Transition Period has now ended, it is not too late to take preparations which will improve the prospects of your business. Proactive steps will help retain workforce as well as reduce or avoid costs, consequential delays and potential contractual liability. In this article, we have highlighted only some of the steps which should be taken. Businesses may benefit from advice on other adjustments that are required.

Is UK construction missing out on Research & Development tax credits?

By David Savage, Partner, Construction, Engineering & Projects



Consider the following three facts:

- The UK's Manufacturing sector contributes £190 billion to the UK economy each year, and gains 30% of all UK Government R&D Tax Credits.
- The UK Information Technology sector contributes £180 billion to the UK economy each year, and gains 24% of all UK Government R&D Tax Credits.
- The UK's Construction sector contributes **£117 billion** to the UK economy each year, but secures **less than 3%** of all UK Government R&D Tax Credits.

UK construction appears to be significantly under-represented in its participation in UK Government provided R&D tax credits. We all know that most UK contractors do not tend to have a large "pure" R&D spend in the sense of funding a single Research and Development department, but that is not the criteria for securing UK Government tax credits. UK construction is a world leader in construction related innovation whether it be in developing new techniques, designs and materials – including to meet evolving safety and environmental standards. All these activities potentially attract R&D tax credits, whether labelled "R&D" internally or not. In many ways every major project is a R&D opportunity for the next major project.

So why do UK construction sector businesses claim less? BDO believe this is more to do with the way that businesses in the construction sector manage R&D claims – and chiefly the fact that the process is not given sufficient attention. This is perhaps understandable when your business is focusing on delivering excellent infrastructure on time and on budget, but it does mean that there may well be scope for construction and infrastructure businesses to improve their bottom line in this area.

If construction is going to help the UK Government "*Build Back Better*", don't miss out on tax credits the UK Government funds to support positive change. I am therefore pleased to share a more detailed note on this topic below from BDO. Read more here.

"Making the most of the UK Government's incentives and grants for research and development should be an easy decision for every company or business. The incentives will either provide a welcome cash injection to your business or reduce your tax burden. With a two year deadline for a claim there is always a chance to submit or even review any projects or activities with a potential innovation or R&D aspect."

Wooden towers – The rise of the "plyscraper"

By Fiona Edmond, Partner, Construction, Engineering & Projects
Katherine Keenan, Associate, Construction, Engineering & Projects

Berlin is to be home to one of the tallest wooden buildings in Europe; the WoHo tower's 29 storeys of offices, flats and cafes will be constructed out of wooden beams and panels with a steel reinforced concrete framework.

Using wood in construction instead of non-renewable materials means that buildings are able to store carbon in a similar way that forests do. An exciting opportunity to reduce a project's carbon footprint. The rise of the "plyscraper" (as these wooden towers are called) does however raise a few questions:

- Will the government ban timber in structures, as well as in cladding? In January 2020 the UK government threatened to ban the use of timber from exterior walls of new residential buildings over 11m, but RIBA and other leading architects are calling for timber to be excluded from the combustible cladding ban to ensure its place in innovative design combatting climate change. The rules on cladding are evolving but at present timber is categorised as "cladding" in the government's ESW (external wall system) requirements issued in November 2020.
- What impact can timber construction have on costs and programme, as well as the carbon footprint?
- Will modular construction become even more prevalent? The Tree in Bergen, Norway, which is one of the tallest timber buildings in the world was constructed using a prefabrication process.
- Is it sustainable? Do we have enough forests and stock for use in the construction industry?

So who will be next to adorn their cityscape with a wooden skyscraper? London is considering the Oakwood Tower proposed to be 300m high with mixed use residential and office space and many other timber buildings are planned all over the world from Tokyo to Vancouver. Exciting possibilities and more to come as the construction industry continues to innovate.

Image: https://www.thetimes.co.uk/article/berlins-woho-wooden-skyscraper-to-spring-up-zx5cds675

Assigning a sub-contract on termination: Which rights is the contractor giving up?

It is common in construction projects for main contractors to assign the benefit of their key sub-contracts to the employer in the event of contractor default and consequent termination of the main contract. This allows the employer to enforce the rights in the sub-contract against the sub-contractor, including rectification of the works and the performance of particular obligations. Indeed commonly used standard form construction contracts, such as JCT Design and Build, NEC and (as in this case) the IChemE form, include clauses permitting such an assignment of the sub-contract to the employer.

A recent decision in the Technology and Construction Court highlights the potential risks associated with such situations. In *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd*, the court found that the nature of the assignment meant that the main contractor could not pursue claims made by the employer against its sub-contractor under the sub-contract. This drastically limited the main contractor's ability to 'pass on' any liability it had under the main contract to the sub-contractor.

By Eveline Strecker, Knowledge Development Lawyer, Construction, Engineering & Projects
Marie-Laure Homolle-d'Arras, Trainee Solicitor, Construction, Engineering & Projects

Background

In 2015, Energy Works (Hull) Ltd (**EWHL**) engaged MW High Tech Projects UK Ltd (**MW**) as the main contractor to design, procure, construct, commission and test a fluidised bed gasification power plant. The main contract incorporated the IChemE Form of Contract for Lump Sum Contracts (Red Book) 2013, with some bespoke amendments. MW entered into a sub-contract, based on the IChemE Form of Subcontract (Yellow Book) 2013, with Outotec for the supply of key elements of the gasification plant. Outotec also entered into a collateral warranty in favour of EWHL.

The main contract was terminated in March 2019 and MW then assigned the sub-contract with Outotec to EWHL.

The parties' claims

In July 2019, EWHL brought proceedings against MW claiming damages for: (i) the cost of rectifying defects; (ii) delay damages; and (iii) additional costs of completing the works and other losses arising from the termination. MW denied being in default and raised a counterclaim of £46.7 million based on the contractual provisions for payment following a termination for convenience.

MW sought an indemnity from Outotec, claiming it was liable for liquidated damages for delay and defects in the plant.

Issues for the court

Among other things, the court had to consider whether MW had any basis on which it could bring claims against Outotec in light of the assignment of the sub-contract, and in particular:

- Whether the assignment of the sub-contract to EWHL only assigned future rights and/or MW's accrued (ie/ past and existing) rights. MW asserted that only its future rights were assigned;
- If all past and future rights were transferred, whether the assignment also transferred all past and future liabilities and obligations and took effect as a novation; and
- Whether MW was entitled to recover any of its losses as a contribution from Outotec under the Contribution Act 1978, on the basis that both Outotec and MW were liable to EWHL in respect of the same damage.

Assignment

There was no doubt that the sub-contract was assigned, but what was the effect of this assignment? MW argued that it would be uncommercial for it to be forced to give up all of its rights against Outotec when it may be responsible for causing MW to incur considerable losses.

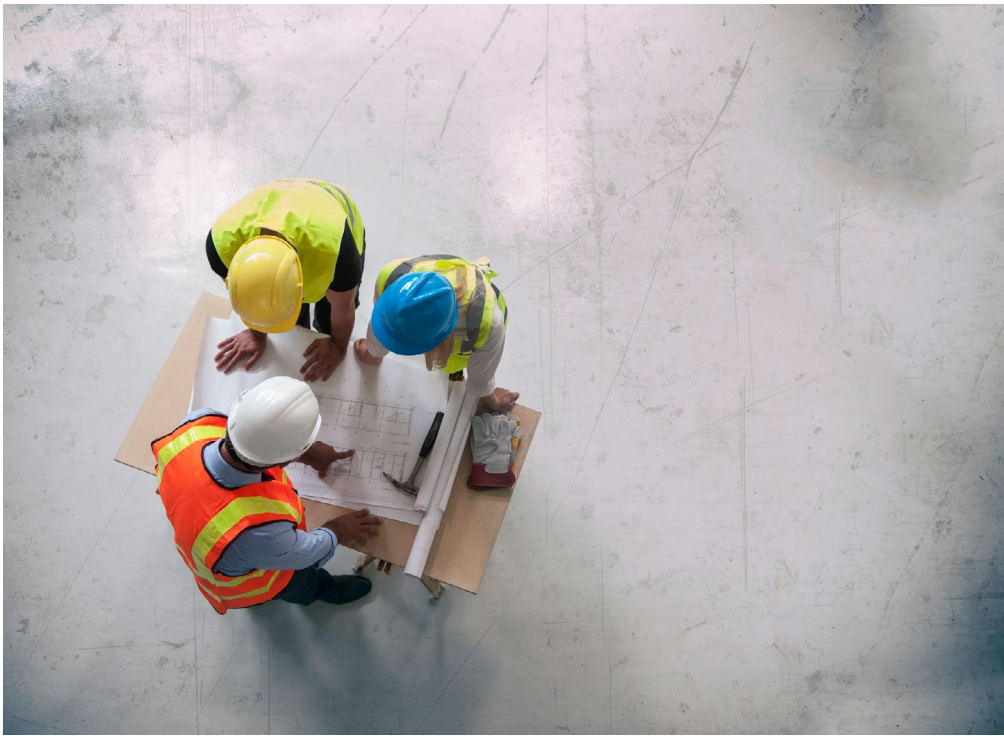
The court considered the contracts and found that MW's agreement to assign the sub-contract was an agreement to assign all of its accrued and future rights under the sub-contract. The key provision in the sub-contract (Clause 9.1 (b)) provided that "if so required by the Purchaser under the Main Contract the Contractor may assign the Subcontract to the Purchaser". This was the "natural and ordinary reading of the words used". The parties could have limited the rights which were being transferred by the assignment, for example, by separating accrued and future rights, but they chose not to do so. Mrs Justice O'Farrell stated: *"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"*.

Novation

The court considered that when the parties used the word "assign" in clause 9.1 of the sub-contract (which is similar to the wording in some commonly used standard form construction contracts), it must be assumed that they meant what they said and were not referring to novation. Although it is possible, in theory, to consent in advance to novation and even if the reference to assignment could be construed as consent to novation the parties did not agree on the terms of the intended novation and, consequently, there was no novation of the sub-contract.

Contribution from the sub-contractor?

Any claim by MW for contribution or indemnity against Outotec could only be brought under the Contribution Act 1978 which states (in section 1(1)): *"any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage"*. The damage for which MW may potentially be liable to EWHL must be the "same damage" for which Outotec is potentially liable to EWHL.



The court considered the three potential heads of loss claimed by EWHL against MW and stated:

- in respect of delay to the project, even though the liquidated damages may be calculated differently or have different caps, MW and its sub-contractor, Outotec, would be liable to EWHL for the same damage. MW could claim contribution from Outotec under the Contribution Act.
- in respect of the termination loss (ie additional costs, if any, of completing the works and associated losses), the court could not identify any provisions under either the sub-contract or the collateral warranty which could form the basis of a claim by EWHL against Outotec in respect of these losses. Accordingly, MW could not claim contribution from Outotec under the Act.
- MW and Outotec had a common liability to EWHL for defective work in the plant. MW could also claim contribution from Outotec in respect of defects.

Going forward

The assignment of a sub-contract by the main contractor upon termination of the main contract may have undesirable and unintended consequences. The main contractor is at risk of liability for claims by the employer without being able to recover its loss from the supply chain. As this decision shows, even claims against the sub-contractor under the *Contribution Act 1978* must satisfy the potentially high hurdle of the 'same damage' rule, and may be quite limited. The starting point is the wording of the contract and the natural and ordinary meaning of the words. As is this case, the court will not read something into the contractual provisions to achieve greater fairness or commerciality between the parties.

Contractors should carefully consider the assignment provisions in their contracts, perhaps seeking to limit the rights assigned to the employer and protecting their accrued rights, although many employers and funders may resist this approach.

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About the Construction, Engineering & Projects group

We are a large team of over 40 specialist lawyers, based in 11 locations across the UK, Europe, the Middle East and Asia, enabling clients to access the full range of the firm's skills and expertise, both in the UK and internationally. The team includes dual qualified barristers and solicitors, engineers, and accredited mediators and adjudicators.

Our Construction, Engineering & Projects group provides the full range of dispute and transactional services for large scale construction and engineering projects, in the UK and internationally.

We act for a wide range of clients, but with a particular emphasis on:

- major contractors
- major engineering consultancies
- real estate developers
- housebuilders
- property investment companies

Our core transactional legal experience include advising on all forms of construction and engineering contracts and associated documentation, insurance arrangements, and all related financial security (such as bonds, guarantees and warranties).

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- court proceedings
- adjudication
- arbitration (domestic and international)
- expert determination
- mediation and dispute avoidance

We focus our dispute resolution strategy on maximising the net recovery for our clients when bringing claims, and minimising or extinguishing their exposure when defending them.

Our full-service approach ensures that an appropriate strategy can be adopted to achieve our client's priorities throughout the lifetime of a project. Our aim is to provide a personable and highly responsive specialist service.

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