Welcome to the Systech Solicitors Legal Update

We are delighted to welcome you to the second edition of our Legal Update which provides informative comment on recent legal issues and cases from around the world.

The Update has been prepared by our global legal team with a focus on the practical issues for contracting organisations.

Systech International has been established for 25 years and in this time we have become a leading provider of consultancy services to contractors in the construction, engineering, infrastructure and energy sectors, supporting the delivery of projects on time and to budget.

Our integrated approach allows us to offer high quality multi-disciplinary services, including legal, from a single business under a single point of responsibility; our solicitors and counsel combine with commercial managers, claims consultants, forensic planners and experts to offer an innovative and cost effective legal services solution.

We hope you enjoy the read and we would be delighted to receive your feedback.

Rebecca and Tom

Rebecca Redhead, Director of Legal Services, UK & Europe
Tom Allen, Director of Legal Services, MEA and APAC

These articles are intended to provide general information about legal topics and have been compiled by Solicitors, Trainee Solicitors and Paralegals. Nothing in these articles or in the documents available through it are intended to provide legal advice. You should not rely on any information contained in these articles, or in the documents available through it, as if it were legal advice. Systech International is not responsible for the operation or content of any external website or hyperlink referred to in these articles.
<table>
<thead>
<tr>
<th>Page</th>
<th>Author</th>
<th>Position</th>
<th>Article/Topic</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Catherine Renault</td>
<td>Solicitor</td>
<td>The challenge of the Public-Private Partnership (PPP) in the EU</td>
</tr>
<tr>
<td>6</td>
<td>John Jo White</td>
<td>Legal Associate</td>
<td>Concurrent Delay - Case Update, Saga Cruises</td>
</tr>
<tr>
<td>8</td>
<td>John Stocker</td>
<td>Legal Director</td>
<td>Challenging the Adjudicator’s Decision</td>
</tr>
<tr>
<td>10</td>
<td>Nigel Cornwell</td>
<td>Legal Director</td>
<td>The Application of Statutory Provisions to Engineering and Construction Contracts</td>
</tr>
<tr>
<td>12</td>
<td>Rebecca Redhead</td>
<td>Director of Legal Services, UK &amp; Europe</td>
<td>Arbitration in Latin America</td>
</tr>
<tr>
<td>14</td>
<td>Stephen Twaites</td>
<td>Solicitor</td>
<td>Issues of Working Under a Letter of Intent</td>
</tr>
<tr>
<td>17</td>
<td>Tom Allen</td>
<td>Director of Legal Services, MEA &amp; APAC</td>
<td>The 'Illegality Defence'</td>
</tr>
</tbody>
</table>
Catherine Renault looks at PPP’s and how they offer a viable alternative to the traditional procurement methods

There is no single definition of PPP. According to the Green Paper of the Commission in 2004, PPP’s are “forms of cooperation between the public and private sectors for the funding, construction, renovation, management or maintenance of an infrastructure or the provision of a service.” In the UK, the Private Finance Initiative (PFI) is the most common form of PPP.

Capital expenditure in PFI projects is generally financed by a mix of equity, sub-debt and senior debt, with the most common split being between 80:20 and 90:10 in favour of debt. Debt finance has been the most common form of finance in PFI, although bond finance has dominated in respect of projects over £250 million². With that structure the government can borrow money on better terms than the private sector. HM Treasury has also developed the Credit Guarantee Finance (CGF) approach, under which the government provides the debt that is guaranteed by private sector banks. The purpose of the PFI grant is to provide local authorities with ongoing revenue support for their PFI projects.

The PPP presents a large panel of benefits, among others, they encourage the private sector to deliver projects on time and on budget, e.g. Millau Viaduct in France. The Millau project is not only an example of the private sector delivering a project on time but also of structuring the project to achieve optimal risk transfer without significant cost to the public sector³.

PPP’s also permit to work within affordability constraints, e.g. the N4/N6 Kinnegag-Kilcock Motorway in Ireland. The largest part of the risk was transferred to the private sector.

Finally, the public sector only pays when the service is delivered. Example of London Underground Limited where ‘Infracos’, the infrastructure companies are paid an annual payment related to the services delivered to passengers.

PPP’s are an attractive alternative to diversify the economy through greater competitiveness of a

2 Allison Page, DLA Piper UK LLP and PLC Public Sector
3 PwC Paul Davies and Kathryn Eustice, “Delivering PPP Promise, a review of PPP issues end activity, November 2005”. 

Catherine Renault
Solicitor, French Qualified
South Africa
catherine.renault@systech-solicitors.com
Co-written with:
Julia Beaucourt, Paralegal
country and to meet the growing demand for infrastructure development. The private sector can offer project management skills, innovation and risk management expertise that can bring benefits.

However, not every project can be delivered through a PPP and the risk of the parties has to be carefully considered. Delays and cost overruns caused by limited public sector capability in managing large, multi-discipline projects could have adverse effects, e.g., Jubilee Line extension, London underground. Given the long-term nature of these projects and their inherent complexity, it is difficult to identify all contingencies during project developments.

In addition, some projects may be easier to finance than others, some projects will generate revenues only in the local currency (e.g., water projects) while others (e.g. port and airport projects) will generate dollars or other international currencies. As a result, constraints in local capital markets may have less impact. However, the risk is limited because the private companies and their lenders will be cautious before accepting significant risks beyond their control, such as currency risks.

With greater use of the PPP model, PPP’s projects need to be based on a solid and effective legal framework and nationals PPP laws could be considered a necessary prerequisite, especially in countries with civil code systems. The approach used by common law and civil law jurisdictions is completely different. More and more countries are establishing dedicated PPP units and propose specific legislation to assist PPP procurement. The lack of a uniform PPP definition creates a challenge in developing PPP legislation, as a number of member states are discovering this new structure. The PPP does not only have a national dimension, the European Investment Bank (EIB) and the European Commission have launched the European Public-Private Partnership Expertise Center (EPEC) to enable public authorities in EU member states and candidate countries to become more efficient participants. In 2014, the European Commission launched seven PPP’s and published the tenders for five of them as part of the European program named ‘Horizon 2020’. The themes of these partnerships were chosen to foster European economic growth, job creation, industrial competitiveness and the well-being of citizens.

Challenged for their cost, opacity and rigidity, denounced on the basis of certain failures or difficulties in their implementation, PPP’s are nevertheless a relevant tool to carry out certain projects, ensuring efficient assets exploitation and public infrastructure.

Indeed, the use of private funding is essential given the constraints of public finances to meet the need of infrastructure investments. Similarly, PPP’s can build an effective framework to protect the public from cost and time delays and ensure quality service throughout the contract term.

PPP’s offer a viable alternative to the traditional procurement methods with its pros and cons, the most important parameters to take into account when working with this structure are national specificities and legislations.

To this end, it is worth noting that since the end of 2012, the UK government has endeavoured to strengthen the PFI structure bringing greater transparency, appropriate risk allocation, acceleration of the delivery and enable long-term debt finance.

Since its introduction in 2012, only a small number of projects have been agreed via the new reform. The ‘buy now, pay later’ agreements between the government and the private companies are controversial and still have to prove their effectiveness.

---

4 European PPP Expertise Centre, “PPP Motivations and Challenges for the Public Sector, why (not) and how”, October 2015.
7 PwC Paul Davies and Kathryn Eustice, “Delivering PPP Promise, a review of PPP issues and activity, November 2005”.
8 Portail du Ministère de l’éducation nationale, de l’enseignement supérieur et de la recherche, Actualité, 11/07/2014
9 HMRC, “A new approach to public private partnerships” December 2012
Back in 2010, we reported on the debate surrounding the issue of concurrent delay.

At the time, the judgment in De Beers UK Ltd v Atos Origin IT Services UK Ltd¹ had just been issued and was of great interest at Systech Solicitors and within the construction industry as the presiding judge followed the ‘orthodox’ approach of the English courts to the matter of concurrent delay, rather than adopting the new ‘apportionment approach’ used by the Scottish courts in City Inn Ltd v Shepherd Construction Ltd².

Fast forward six years and Ms Sara Cockerill QC sitting in the Commercial Court has recently issued a judgment in the case of Saga Cruises BDF Ltd v Fincantieri SpA³ which re-visits the issue and usefully summarises the principles which apply when cases of concurrent delay arise.

**So, what is ‘concurrent delay’?**

According to Keating, "concurrent delay has been defined as a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency."⁴

A key consideration when discussing concurrent delay is whether a contractor would be entitled to an extension of time and loss and expense for an employer culpable delay notwithstanding the fact that it is also in culpable delay.

¹ [2010] EWHC 3276
² [2008] B.L.R. 269
³ [2016] EWHC 1875
⁵ [2000] EWCA Civ 175

The ‘orthodox approach’ to concurrent delay

The ‘orthodox’ approach of the English courts to this problem can be found within Dyson J’s judgment in Henry Boot Construction Ltd v Malmaison Hotel (Manchester) Ltd⁶, wherein he stated: "…it is agreed that if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the Contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus, to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because the contractor has a shortage of labour (not a relevant event) and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on
grounds that the delay would have occurred in any event by reason of the shortage of labour”

Where concurrent delay has occurred, subject to the wording of the contract in question, adopting the orthodox approach would mean that a contractor would be granted an extension of time but its claim for loss and expense would be rejected. Therefore, it would receive time but no money.

Many practitioners argue that the ‘orthodox approach’ should not apply, as in cases of true concurrent delay, the ‘but for’ causation test is not satisfied.

A refining of the ‘orthodox approach’: Saga Cruises BDF Ltd v Fincantieri SpA

The facts are outlined as follows:
- In 2011, the cruise ship owner Saga Cruises BDF Ltd (Saga) entered into a contract with Fincantieri SpA (Fincantieri) for the ‘Dry Docking, Repair & Refurbishment’ of a ship called the “Saga Sapphire”
- The works were scheduled to start on 9 November 2011 and to be completed by 17 February 2012
- The works were considerably delayed by strikes
- The parties agreed to postpone the scheduled completion date until 2 March 2012
- Due to further delays the vessel was not re-delivered to Saga until 16 March 2012 and did not leave port until 19 March 2012
- Saga made two claims, the second of which was a claim for liquidated damages in respect of the delay in redelivering the vessel, amounting to €770,000

In respect of the second claim, Fincantieri argued in defence (amongst other things) that the delay was due to two concurrent events and that, as Saga was responsible for one of those causes, no liability for liquidated damages should arise.

The judge considered the authorities referred to above but also paid particular attention to the judgments in Royal Brompton Hospital NHS Trust v Hammond and Adyard Abu Dhabi v SD Marine Services6 (which followed but refined the ‘orthodox approach’), citing the following tests to use when analysing whether there is concurrent delay:
- Concurrent delay is “a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency”
- “There is only concurrency if both events in fact cause delay to the progress of the works and the delaying effect of the two effects is felt at the same time”
- “The act relied upon must actually prevent the contractor from carrying out the works within the contract period or, in other words, must cause some delay”
- There must be ‘proof that the event or act causes actual delay to the progress of the works”

Having concluded her summary of the relevant authorities, the judge stated as follows: “A careful consideration of the authorities indicates that unless there is a concurrency actually affecting the completion date as then scheduled the contractor cannot claim the benefit of it. Causation in fact must be proved based on the situation at the time as regards delay.”

Applying her conclusions to the facts of the case, the judge found that:
- Fincantieri was responsible for matters causing delay between 2 and 16 March
- Saga was responsible for a number of delaying events between 2 and 16 March but they did not ‘cancel out’ Fincantieri’s own delays
- Fincantieri was not entitled to rely on delays for which Saga was responsible as they did not prevent Fincantieri from completing the works. Accordingly, Fincantieri was liable to pay liquidated damages to Saga

Conclusion

Although this case provides a useful summary of the authorities relevant to issue of ‘concurrent delay’, until the law on this issue is settled by the Supreme Court, the debate will continue as to how concurrent delay should be properly assessed.

Three practical solutions for clients seeking to minimise their risk in relation to ‘concurrent delay’ are to:
1. Include express wording in contracts which adequately allocates risk in circumstances of concurrent delay
2. Maintain robust contemporaneous site records so that the effect of all delay can be fully evidenced and substantiated
3. Undertake a thorough delay analysis prior to proceeding to dispute in order to ascertain whether concurrent delay, i.e. one that prevents completion, actually exists

6 [2002] EWHC 2037 (TCC)
7 [2011] EWHC 848 (Comm)
Challenging the Adjudicator’s Decision

John Stocker considers the approach taken by the courts when considering a challenge to an adjudicator’s decision

Enforcing the Adjudicator’s Decision

Robust? Purposive? That is the approach that the courts have taken towards the enforcement of the adjudicator’s decision. Even if the adjudicator’s decision contained errors of law or fact, a court will generally enforce any decision the adjudicator makes provided that the adjudicator has the necessary jurisdiction. This approach, therefore, emphasises the purpose of adjudication which is to find a quick and cost-effective solution to settling a dispute.

The adjudicator’s jurisdiction stems from s. 108(2)(f) of the Housing Grants, Construction and Regeneration Act (the ‘Act’). If the construction contract does not adhere to the requirements of the ‘Act’ there is a statutory default which gives additional powers to the adjudicator under the Scheme for Construction Contracts 1998.

This article will focus on the basic principles of enforcing the adjudicator’s decision and consider the approach taken by the courts when considering a challenge to the decision.

The two most popular grounds used to challenge the adjudicator’s decision are that it is a breach of natural justice and that it is outside the adjudicator’s jurisdiction.

Natural Justice

Commonly, a breach of natural justice occurs if:

- The adjudicator has committed a procedural irregularity by not following the sanctioned procedure to come to his decision;
- The adjudicator has failed to act impartially;
- The adjudicator has shown bias in his actions; or
- Neither party was given a fair opportunity to present their case.

In ABB Ltd v Bam Nuttall the judge found that a failure in the decision-making process by the adjudicator was a serious breach of natural justice and, as a result, refused to enforce the adjudicator’s decision. The challenge was made after the adjudicator had failed to bring to the attention of the parties a specific clause in the subcontract upon which he had relied and which might have attracted comment from them, even though neither party had referred to it in their submissions. To avoid breaching natural justice or creating scepticism and doubt over their decisions, adjudicators must disclose every aspect of how they make decisions during the adjudication process.
In Cantillon v Urvasco the judge said that any breach of natural justice by the adjudicator must be material to his decision and not just evident. A breach is material if the adjudicator failed to bring to the parties’ attention a particular point that is either decisive or of considerable importance to the outcome of the dispute, rather than one that is merely irrelevant or peripheral. This is, of course, a question of degree as no breach would occur if one party has argued a point which the other party simply ignored.

There is an obvious breach of natural justice when an adjudicator decides to act in a “frolic of his own”, meaning that he has significantly strayed outside the ambit of the matter put before him without giving the parties an opportunity to comment.

**Adjudicator’s jurisdiction**

An adjudicator has acted outside his jurisdiction if:
- There was no dispute between the parties or it had not yet become crystallised;
- The adjudicator was improperly appointed;
- The contract is not a construction contract according to the Act; or
- No decision was reached or communicated within the statutory limit of 28 days

It is the Notice of Adjudication that defines the scope of the referral. If the adjudicator decides to consider matters which were not referred to him in the notice, then the decision he makes is outside his jurisdiction and will not be enforced. This must be viewed objectively giving consideration to whether the adjudicator confined himself to the issues that were put before him by the parties.

In Goldsworthy v Harrison the defendants challenged the decision of the adjudicator on two grounds:
1. There was no final agreement that the contract contained an adjudication clause; and
2. The adjudicator had no jurisdiction to decide on the dispute over interim payments. The latter ground was rejected by the judge despite the issue of a final certificate during the adjudication. Such a certificate, if issued during adjudication, may have to be taken into account as impacting on the parties’ dispute. Here, however, the judge endorsed the adjudicator’s entitlement to treat it as being of little significance. With regards to the first ground, the judge decided not to enforce it as it could not be confidently decided without a full evidential picture. The judge consequently declined to grant the summary judgement to the claimant.

Stellite Construction v Vascoft reminds us that the ambit of the adjudicator’s jurisdiction will be considered by reference to the nature, scope and extent of the dispute identified in the notice of the adjudication. In this case, the judge held that the adjudicator did not breach the rules of natural justice, but he did exceed his jurisdiction. Having found that time was at large the adjudicator took it upon himself to set a reasonable date for completion.

**Harding v Paice** imports the reasonable person test when considering whether the adjudicator in the fourth adjudication actually had jurisdiction. The overlap between the third and fourth adjudications meant that the latter adjudicator did not have jurisdiction and his decision could not be enforced.

In Ground Developments Ltd v FCC Construccion SA there was an unsuccessful challenge to the adjudicator’s decision. The rejection by the judge of seven defences to the enforcement of the decision represents the court’s purposive and robust approach to enforcing the adjudicator’s decision. It is a reminder that the court will not give consideration to insubstantial arguments that are tactically put forward just to avoid compliance with the adjudicator’s decision.

**The moral of the story**

If contemplating challenging an adjudicator’s decision it is important to bear in mind the viewpoint of Chadwick LJ in Carillion v Devonport. Here he stated that when seeking to challenge the adjudicator’s decision without valid cause on the ground that he has exceeded his jurisdiction or breached the rules of natural justice there is likely to be a substantial waste of time and expense.

It must also be highlighted that adjudication decisions are only temporarily binding on the parties and do not become final and binding until they have been determined by arbitration, litigation or agreement.

---

3 Cantillon Limited v Urvasco Limited [2008] 282 (TCC)
4 Stellite Construction Limited v Vascoft Construction Limited [2016] EWHC 792 (TCC)
5 The Hon Sir Vivian Ramsey, Keating on Construction Contracts, 10th Edn., Ch 18
7 Goldsworthy v Harrison [2016] EWHC 1589 (TCC)
8 Stellite Construction Limited v Vascoft Construction Limited [2016] EWHC 792 (TCC)
9 Paice & Anor v MJ Harding (t/a MJ Harding Contractors) [2015] EWHC 661 (TCC)
10 Ground Developments Ltd v FCC Construccion SA [2016] EWHC 3946 (TCC)
11 Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2006] EWCA Civ 1358
In considering rights and liabilities of a party, it is usual in both civil and common law jurisdictions that the express provisions of a contract will be looked at first. However, as provided by statute, it is possible for contractual provisions to be overridden or amended. Gaps found in a contract can be filled with entitlements and obligations required by statute of that relevant jurisdiction. Therefore, it is necessary when contracting to understand what is required by law and what will be applied.

Common law jurisdiction – UK

There are various UK statutes which imply terms into construction contracts, including:

- The Supply of Goods and Services Act 1982, where if not expressly stated or commonly understood (and deemed as ‘reasonable’), services should be carried out with reasonable skill and care;
- The Defective Premises Act 1972 which implies work to be conducted professionally and for the dwelling to be “fit for habitation when completed”;
- The Late Payment of Commercial Debts (Interest) Act 1998 which applies if there is no express substantial remedy;

A good demonstration of how the UK entrenches statute in construction contracts can be seen in the Housing Grants, Construction and Regeneration Act 1996 (the ‘Act’) which is supported by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (‘Scheme’).

The Act contains minimum requirements which cannot be contracted out of, including:

- The right to adjudicate;
- Entitlement to periodic payments;
- An adequate payment mechanism, with due date and notice;
- Suspension for non-payment; and
- Restriction of “paid when paid” provisions.

The Scheme is implied into a contract where, for example, there are non-compliant payment provisions under the Act.

Where express and implied terms appear to conflict, the courts will try to avoid contradicting the intentions of the parties or go against an express

---

1 Supply of Goods and Services Act 1982, section 13
2 Defective Premises Act 1972, section 11
3 Late Payment of Commercial Debts (Interest) Act 1998, section 8(1)
4 As amended by the Local Democracy, Economic Development and Construction Act 2009
The case of Manor Asset Ltd v Demolition Services Ltd demonstrates how terms can be implied (whilst compliant with statute) into a bespoke agreement containing express terms, so as to ensure the intentions of the contract are not undermined as a whole.

In this matter, the deadline for submitting a Pay Less Notice was found by the court to be amended by an implied term and therefore held a sufficient payment mechanism. Controversially, section 111 (5) of the Act was construed so that the ‘prescribed period’ for a Pay Less Notice was found to be ‘nil’. Before this matter, statute appeared to restrict a Pay Less Notice being issued before an invoice. This case demonstrates how terms can be implied into construction contracts where statute cannot remedy a matter, specifically in light of express agreement.

Civil law jurisdiction - UAE

Many civil law jurisdictions have civil codes. Within those civil codes, Articles can be found in relation to contracts, including contracts for works and services.

Article 265(1) of the UAE Civil Code provides that “If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties.” Therefore, any express agreement should be considered first when assessing a party’s entitlements and obligations.

In civil law jurisdictions terms are not implied into contracts in the same way as common law jurisdictions. However, Article 246 of the UAE Civil Code, for example, provides for the application of the principle of good faith and recognises the custom and nature of a transaction. Therefore, this suggests that it is recognised under UAE law how parties should not prevent or hinder each other in carrying out their contractual obligations.

Article 106 of the UAE Civil Code restricts a party from unlawfully exercising their rights. This article assisted by the principle of good faith, could assist in the event of a construction dispute where, for example, an employer is enriched at the expense of the contractor via liquidated damages claimed but the employer was culpable for the delay.

Article 287, unless otherwise agreed, potentially accommodates for the concept of ‘time at large’ which is not directly recognised under UAE law. Article 287 states that: ‘If a person proves that the loss arose out of an extraneous cause in which he played no part such as a natural disaster, unavoidable accident, force majeure, act of a third party, or act of the person suffering loss, he shall not be bound to make it good in the absence of a legal provision or agreement to the contrary.’

This is similar to what is seen in other civil law jurisdictions. Under Section 280(1) of the German Civil Code, if a party is unable to comply with their obligations through the fault of those whom the obligation is intended for, then that party cannot insist on compliance. Therefore, time is to be held at large (also known as the ‘prevention’ principle) where a contract does not provide for the completion date to be extended.

Overall there is scope to suggest that if a party is prevented from completing the works by the time for completion through a cause not attributable to them, they should not be liable for the delay.

Article 247, provides for mutual obligations and suspension for non-performance in the absence of agreement. This article appears to further encourage the parties to act in good faith.

Article 290 states that: “It shall be permissible for the judge to reduce the level by which an act has to be made good or to order that it need not be made good if the person suffering harm participated by his own act in bringing about or aggravating the damage.”

‘Concurrent delay’ is not expressly provided for in the UAE but the above provides scope that where, one party has participated in a delay, any subsequent damages can be reduced in light of the evidenced involvement, reflecting the principle of apportionment applied in some countries.

Conclusion

In both types of jurisdictions, the courts will, where possible, apply the express terms contractually agreed and intended. Caution should be taken when entering into a construction contract and any Articles or Statute implying terms which cannot be contracted out of should be considered to minimise and manage risks from the outset.

---

5 London Export Corp v Jubilee Coffee Roasting Co [1958] 1 W.L.R 661
6 Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC)
7 Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC), para 65
Arbitration remains a preferred mechanism to resolve a vast majority of disputes, particularly in international trade, due to the recognised enforceability of its awards, simplified procedures, flexibility as well as the neutrality that it offers¹.

Consequently, over the last 20 years, international arbitration has become increasingly popular in many Latin American countries. As investment in the area, especially from Asia increases, the choice of arbitration clauses to govern the parties’ agreement becomes greater. New legislative revisions have taken place and others are underway.

Thus, it appears that, despite some setbacks, arbitration in Latin America is yet growing and has prospects of more development in the future.

Old Doctrines

Even though Latin America has been considered traditionally reluctant to embrace international arbitration, there has been a remarkable change of attitude since the 1990’s.

The region’s antagonistic attitude can be traced to the so-called Calvo doctrine, which held that foreign parties should not be entitled to a higher degree of protection than local parties and therefore had to submit their claims to local courts.

Likewise, the notion prevailed that judicial activity belonged to the State exclusively, justifying the existence of outdated domestic legislation.

Changing Attitudes

With the economic and political evolution of the region, it became necessary to develop strategies to appeal to foreign investment and revise legal frameworks to offer more attractive conditions.

The adoption of the Panama Convention under the auspices of the Organization of American States signaled the first steps towards acceptance of arbitration in Latin America².

Main economies of the region took further measures to modernise their laws based on or inspired by the UNICITRAL “Model Law”³. ICSID, the dispute-resolution framework for investment protection enacted under the Washington Convention was ratified⁴ and, by the end of the 1990’s, 14 of the 18 major Latin American countries were party to the

---

¹ The 2015 Survey ‘Improvements and Innovations in International Arbitration’ by the School of International Arbitration at Queen Mary University of London: http://www.arbitration.qmul.ac.uk/docs/164761.pdf.
² The Inter-American Convention on International Commercial Arbitration.
⁴ The International Centre for Settlement of Investment Disputes (part of and funded by the World Bank Group).
New York Convention®.

Setbacks

Despite these achievements, there have been unexpected drawbacks that may affect the legal development achieved in recent years.

Argentina was object of several claims before ICSID®, followed rapidly by other countries in the region. This facilitated a perception among governments that the ICSID system favored the interests of investors, to the detriment of those of the states. Thus, Bolivia withdrew from the ICSID in 2007, followed by Ecuador in 2010 and Venezuela in 2012.

The fact that these measures had eminently political motivations had a quite negative impact on the international arbitration and economic communities. If other countries continue collecting cases against them or obtaining negative decisions before ICSID arbitrators, it is possible that the list of ICSID withdrawals will increase in the Americas.

Old-fashioned local customs are also threat. Although a lot of experience and knowledge has been gained recently, there is a large group of practitioners who are not able yet to discard some civil procedural customs. This often implies more complicated arbitrations, which are slow and therefore more expensive.

Many local institutions have fed this habit, showing a strong tendency to regularize arbitration procedures inspired by the civil process, which, together with the use of purely dilatory tactics, conflicts with international arbitration practices.

Other issues are proliferation in arbitration centers, which has resulted in some cases in poorly managed arbitration; the number of acting arbitrators not growing at the same rate as the cases and a seemingly low understanding and usage of the New York Convention.

Present

However, the balance is still highly positive. Peru, Costa Rica and more recently Colombia have revised their laws®, further modernising existing systems and, even after their conflicting decisions, Bolivia, Venezuela and Ecuador seem to be aware of the necessity to find an alternative to the ICSID mechanism®.

Indeed, to date, most Latin American countries are party to the New York Convention. The ICSID Convention also continues with a significant number of these states and, while it is true that Brazil has not ratified it or the investment protection agreements signed with some countries, it has provided other forms of guarantees for investments made in the country®.

In addition, more and more parties from Latin America intervene in arbitrations before the International Chamber of Commerce (ICC), the world’s leading trade arbitration centre®.

Not only are there well served legal frameworks but also a variety of reputable arbitration centers such as the international division centers of the American Arbitration Association (AAA) and the ICDR, which works with several prominent centers like the Arbitration Center of the Chamber of Commerce of Bogota and the Arbitration center of the Brazil-Canada Chamber of Commerce. Bogota, Lima and Santiago have state of the art arbitration centres.

Likewise, the prejudice or distrust towards Arbitration within the local law community has faded. There is already a significant number of experienced and specialized referees and Latin American lawyers along with a rise in the number of law firms that have created arbitration practice teams. An increasing inclusion of arbitration clauses in contracts, especially construction, purchase of shares and joint ventures has taken place.

An important trend in the region is that decisions have been obtained from the judiciary clearly supporting the use of arbitration by enforcing deals and awards with a positive degree of predictability.

This harmonious work of arbitrators and the judiciary, supported by the arbitral institutions, is the critical factor for the future of arbitration in Latin America and will allow reliable, expeditious dispute resolution systems that meet the needs and specialisation demanded by today and tomorrow’s world.

---

8 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
9 Argentina collected 25 cases before ICSID, 167 pending ICSID cases by 2012 and has repeatedly expressed desire to also withdraw from ICSID.
10 Peru, law 1071/08; Costa Rica, law 893/11; Colombia, law 1563/12.
11 24 BITs (bilateral investment treaties) in force in Venezuela provide arbitration under UNCITRAL. Bolivia and Ecuador cannot accede again to the Convention due to restrictions in their Constitutions, so the most they can do is try to renegotiate their BITs.
12 Arbitration Law 1325/2015 establishes that government bodies are authorized to apply arbitration procedures to legal matters regarding alienable rights. The UNCITRAL Model Law has not formally integrated but several formal requirements of the arbitration agreement are influenced by it. Several arbitration organizations are commonly used CCBC, AMCHAM, ICA/ICC.
13 ICC cases involving Latin American parties rose to nearly 20% in 2012. In 2011, 247 ICC cases involved a Latin American party.
Issues of Working Under a Letter of Intent

Stephen Twaites looks at the key issues to consider when entering into a Letter of Intent agreement

In many construction projects, the pre-contract and negotiation stage that follows a contractor’s appointment can be a lengthy process. However, projects are both time and cost sensitive and circumstances often require a contractor to commence works before executing a formal contract. This is where a Letter of Intent (LOI) comes into effect.

Why use a Letter of Intent?

Letters of intent offer commercial and practical benefits to both the contractor and employer. The employer can jumpstart the design, procurement, and early phase works by allowing the contractor to commence works while negotiations are still ongoing. Moreover, contractors can also focus on project delivery as the letter offers some indemnity in that it will be paid for the pre-contract works. In return, both parties take on more certainty in terms of achieving the completion date.

Is it a binding contract?

Before commencing works, it is important for contractors to understand the nature of the LOI and whether it is a binding contract.

The answer to this is not always straightforward and whilst the legality of a LOI would ultimately be at the courts discretion, it could be broadly separated into two categories:

• A non-binding agreement of future intentions; or
• A standalone contract until a formal contract is executed.

Non-binding agreement

A non-binding agreement can have adverse consequences for a contractor. There is no certainty as to the terms of the contract but more notably, the contractor has no means of payment.

For a LOI to be binding, the usual elements for a legal contract must be present. This includes, amongst others, certainty and consideration. Wording such as ‘subject to contract’ or ‘not intended to be legally binding’ are common indicators that there is no binding contract. However, this is not conclusive and in most cases, the courts will look at the circumstances surrounding the case.

The case of British Steel Corp v Cleveland Bridge¹ was an example where the court considered whether a contract had formed after the subcontractor had commenced works under a LOI.

In this case, British Steel was engaged by Cleveland bridge to manufacture and supply cast-steel nodes. The LOI proposed that works commence

1 [1984] 1 All ER 504
The case of Mowlem v Stena Line Ports\(^4\) concerned whether the contractor who was engaged to construct a new ferry terminal was entitled to be paid for works carried out after the LOI had expired, and whether it was entitled to be paid a reasonable sum for works that exceeded the value of the LOI.

In this case, it was common ground that Mowlem was engaged by Stena to carry out works under a series of letters of intent. It was also accepted by both parties that each of the letters took effect in law.

The issue in question was whether the final LOI which was provided for Mowlem to carry out works until 18 July 2003, up to a value of £10 million, expressly limited the contractor in respect of both time and money. Mowlem’s argument was that Stena permitted them to continue working beyond the limits expressed in the LOI and that it was entitled to a payment of a reasonable sum for the works.

In rejecting Mowlem’s claim, the court found that the parties had entered into contract in the terms of the final LOI and concluded that Mowlem was entitled to payment for the works subject to a maximum value of £10 million.

Conclusion

Where possible, contractors should avoid working under a letter of intent. However, as evidenced in Ampleforth v Turner Townsend\(^3\), letters of intent are acceptable in view of the perceived importance of achieving early commencement and completion.

Nevertheless, if the contractor is required carry out pre-contract works, it should, in the minimum, check whether the followings points are satisfied:

- Is there certainty as to key terms? Ambiguity is the most common pitfall in a LOI and the contractor should ensure essential terms such as the final price, scope of work, milestone dates, interim/progress payments, variations and extension of time are agreed. In essence, the form of the main contract should be agreed and subject to final negotiations. Any items to be agreed should be clearly recorded in the LOI. The contractor should also take into consideration what terms the employer considers to be essential (e.g. liquidated damages) and ensure they are covered in the LOI.
- Is there an intention to create legal relations? Under English law, there is a presumption to

\(^2\) Twintec Ltd v Volkerfitzpatrick Ltd [2014] EWHC 10 (TCC).
\(^3\) [2012] EWHC 2137 (TCC).
\(^4\) [2004] EWHC 2206 (TCC).
create legal relations in a commercial transaction but the critical question is whether the parties only intend to enter into legal relations once a formal contract is signed.

- Is there consideration? Is the contractor promised something in value (usually remuneration) in return for the works?
- Is there an expiry date? Contractors should check the date and encourage the prompt execution of a formal contract. If the LOI expires, it should be reissued to avoid uncertainty. Payment on a quantum meruit basis is at the court’s discretion and may not always have favourable outcome for the contractor.
- Is there a financial limit? Contractors must check the cap and stay within the specified costs. If the contractor exceeds this limit the contractor may or may not recover these costs.

---

5 [2010] UKCS 14
6 ERDC Group Ltd v Brunel University [2006] EWHC 687 (TCC)
The Illegality Defence

Tom Allen explores the history of the Illegality Defence, its current day application and when it is most likely to be used in construction matters.

There is no doubt that the ‘Illegality Defence’ is very unique in its nature and even more complex in its application. There are not too many examples of defences that the court will plead even if you do not but, the Illegality Defence is one.

The Illegality Defence originated from the case of Holman v Johnson1 where Lord Mansfield stated that: “No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act” or “ex turpi causa non oritur actio”2.

From this landmark case, the Illegality Defence was born.

Put simply, the court as a matter of public policy will seek to preclude a party from utilising or enforcing an illegal or immoral action as the basis for its action.

It has long been established that illegality can be used as a defence and most notably those involving the enforcement or validity of a contract. Most, if not all, construction projects involve some form of contract, however illegality is an unusual and rarely used legal principle within the industry.

This article will explore the history of the Illegality Defence and its current day application to case law, including the developments and progressions in this area, when the Illegality Defence is most likely to be used in construction matters, practical applications of the defence, the different approaches that are now taken, the opposing opinions surrounding it and what the future holds.

History

After Holman1, along came the case of Tinsley v Milligan4 which established the reliance principle. This principle highlights that if the claimant needs to ‘rely on’ or bring evidence relating to illegality, in order to prove his or her claim, then the claim will fail. However, if the claimant can prove the case without relying on such evidence, then regardless of the substantive involvement of any serious illegality, the claim can succeed5. This principle was then followed and relied upon in later cases for many years.

---

1 Holman v Johnson [1775] 1 Cowp 341
2 Finding Principle in Illegality: Reflections on Tinsley v Milligan, Matthew Chan, Page 13
3 Holman v Johnson [1775] 1 Cowp 341
4 Tinsley v Milligan [1994] 1 AC 340
5 The Illegality Defence, Law Commission, Reforming the Law, page 2
A new approach

Recently, the Illegality Defence has been revisited in the case of Patel v Mirza. Here, the Supreme Court considered the circumstances in which illegality should be a defence to a civil claim, and in particular whether a claimant who had not executed the contract and had transferred money pursuant to an illegal contract could recover the sums paid.

Surprisingly, the Supreme Court overruled the test approved by the House of Lords in Tinsley. Instead, they introduced a new test. They held that a claim will not be enforced if it would be harmful to the integrity of the legal system. When applying this new test there are three considerations to be made:

- The underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim;
- Any other relevant public policy on which the denial of the claim may have an impact; and
- Whether denial of the claim would be a proportionate response to the illegality.

The overruling of the reliance test in this case represented a shocking new approach to the Illegality Defence and how it is applied in the courts.

It is fair to say that the strong dissent expressed in the case does still give the sense that this matter is not yet closed and that in particular it may not be clear that Patel v Mirza would be followed for the enforcement of a contract.

Practical application

With this continued uncertainty, where exactly does this leave us with its application and relevance to the construction industry?

As stated above, the Illegality Defence can be used in a wide variety of claims. Some of these claims include everyday situations that could easily occur on a construction project such as dishonesty and corruption (i.e. fraud).

In the case of Taylor v Bhail, the builder sought to provide a form of remuneration to the employer by way of inflating the cost of the building works and, in doing so, defraud the insurers who were paying for the works. The idea being that the additional cost would be provided to the employer for giving the work to the builder. The court found that this was an illegal contract and therefore could not be enforceable.

A common occurrence in construction matters would be where a contractor fails to comply with building regulations.

In Stevens v Gourley, the contractor was unable to recover payment for works where he purposely proceeding with the construction of a shop made from wood and erected upon wooden foundations with a deliberate intention to ignore statutory requirements that building must be made from incombustible materials.

It is important to distinguish that the carrying out of an unlawful or immoral act in the course of executing a contract would not in itself render a contract invalid or unenforceable but rather the contract must have been made with the purpose of carrying out such illegality.

Contravening building regulations would not necessarily be subject to such a position. It must be clear that the contract was founded on the basis that the builder was always intending to do so rather than simply failing in the execution of certain works to achieve the necessary requirements.

Looking forward

It is important to consider the significance of the established principles and history behind the Illegality Defence. However, it would be fair to say that a change in this area would be beneficial in order to avoid the rigidity of the reliance principle, but also the uncertainty of the range of factors approach. A balance must be struck between the two opinions to find the best way forward and once this is established it will hopefully allow the law in this area to progress successfully.

---

5 Patel v Mirza [2016] UKSC 42
6 Supreme Court adopts "range of factors" approach to illegal transactions, and overrules reliance test, Practical Law, Michael James, 22-Jul-2016
7 Tinsley v Milligan [1994] 1 AC 340
8 Supreme Court adopts "range of factors" approach to illegal transactions, and overrules reliance test, Practical Law, Michael James, 22-Jul-2016
9 Contracts: invalidity, Practical Law, 2016
10 [1995] EWCA Civ 54
Systech Solicitors
A global legal solution from a single business

Our solicitors and counsel combine with commercial managers, claims consultants, forensic planners and experts from Systech International to offer contractors an innovative and cost effective approach to legal services.

We provide contentious and non-contentious advice to our clients over the full lifespan of a project – from initial involvement in the structuring and drafting of contracts to formal dispute resolution and advocacy. Solicitors are also available for short and medium term secondments, becoming part of your team and working under your instruction.

Our solicitors, counsel, advocates and paralegals, who are regulated by the SRA in England and Wales, operate across different jurisdictions from both civil and common law systems and a number of our team sit as part-time judges, arbitrators or adjudicators and on dispute review boards.

Our consultants work together under a single point of responsibility to provide a fully co-ordinated and seamless service from the outset of a project to its conclusion, avoiding the abortive work that often arises when using multi-party advisors.

Our cost effective performance fee based service is half the cost of that charged by traditional solicitor practices and also benefits from full legal professional privilege (Water Lilly v Mackay).

Legal issues are often complex and we are able to use our in-house visualisations expertise to demonstrate the key facts pictorially, aiding communication with the key decision makers and avoiding the confusion that can be caused by language issues.

We operate from our offices across Europe, the Middle East and Africa, Asia Pacific and the Americas, locations that are ideally placed for the global seats of arbitration.

- International Chamber of Commerce, Paris [ICC]
- Dubai International Arbitration Centre [DIAC]
- Singapore International Arbitration Centre [SIAC]
- London Court of International Arbitration [LCIA]

Contentious and non-contentious services
- Procurement strategy
- Contract advice
- Contract risk
- Partnering / JV / framework agreements
- PPP / PFI
- Dispute management and resolution
- Adjudication, mediation, arbitration and litigation
- Training
- Interim legal services

Sectors
- Construction [building, civil engineering, MEP]
- Transportation [rail, air, highways]
- Energy [power, oil and gas, mining]
- Telecommunications and IT
- Shipping and marine
- Industrial and process
- Facilities management

Contacts

Rebecca Redhead
London
Director of Legal Services, UK & Europe
rebecca.redhead@systech-solicitors.com
Tel: +44 (0) 207 940 7656

Tom Allen
Dubai
Director of Legal Services, MEA and APAC
tom.allen@systech-solicitors.com
Tel: (+971) 4 420 8900

www.systech-int.com