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1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (*NB* For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

As a common law jurisdiction, contracts in England require the rights and liabilities of the parties to be set out in detail in the terms of the contract. The majority of construction work in the United Kingdom (the "**UK**") (particularly building work) is carried out under conventional arrangements, with a main contractor appointed under a construction contract, sub-contractors appointed under sub-contracts by the contractor, and a professional team which is engaged by the employer (with key designers sometimes novated to a contractor undertaking design and build obligations).

The type of construction contract required for a project is governed by a number of variables such as the project sector, extent of design responsibility and size/complexity of the works.

Standard-form construction contracts can be used for more traditional procurement (where the contractor carries out the works in accordance with designs produced by the employer's design team), e.g. the Joint Contracts Tribunal ("**JCT**") Standard Building Contract 2016; and for design and build (where the contractor carries out the works and assumes some or all of the design responsibility), e.g. the JCT Design and Build Contract 2016 or JCT Major Project Form of Contract 2016.

Management contracting is one of two forms of management procurement used in the UK. Under this procurement route, the management contractor does not carry out works itself but is paid a fee to enter into and co-ordinate a series of sub-contracts. The management contractor is required to enforce the terms of the subcontract and recover, for the benefit of the employer, the amounts so paid or credited to the management contractor.

Where the contractor is engaged to manage the works for a fee but the employer engages each trade contractor directly, this is known as "construction management". The JCT has produced a standard-form management contract and construction management contract, although we have experience of clients using bespoke forms.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

Collaborative contracting is becoming more prevalent, as UK government best practice guidance has featured collaborative contracting as a core requirement, with the aim of reducing costs in public procurement. The core idea in collaboration is that the risk should be actively managed during the project and adversarial behaviours replaced with mutual trust and co-operation. In this sense the NEC4 Engineering and Construction Contract reflects this ethos, with optional provisions that are collaboration related. For example, the NEC4 Engineering and Construction Contract Option C contract usually incorporates a gain/pain sharing mechanism under which the employer shares, with the contractor, the benefit of any cost savings or the burden of any cost overruns on a 50/50 basis, which is structured around a target price. In addition, the rise in Early Contractor Involvement ("**ECI**") comes with the expectation of greater collaborative activities between the contractor, owner and project designers throughout the ECI phase.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

In the UK real estate development sector, the JCT suite of contract has remained dominant, but with entertaining competition offered by the NEC (formerly known as the New Engineering Contract) suite of contracts, offering a more pro-active approach to risk management.

International projects in the energy and engineering sector (including those involving UK-based contractors) tend to be procured using the FIDIC (International Federation of Consulting Engineers), Logic or MF/1 (Model Form) forms of contract, with the forms used dependent on the type of project/sector.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

Recently, the NEC3 Engineering and Construction Contract has been used in the UK public sector as the contract of choice on large-scale projects such as at the Olympics, nuclear projects and at Crossrail.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

A simple contract is made by one party accepting an offer made by the other party. The resulting agreement is enforceable if there are intentions to create a legal relationship and the promises are supported by consideration.

A deed is a contract in writing which complies with certain formalities under English law (i.e. guarantees must be in writing and signed by a person authorised by it in order to be effective) and is enforceable even in the absence of consideration.

The Housing Grant, Construction and Regeneration Act 1996 (as updated) (the "**Construction Act 1996**") imposes mandatory requirements in relation to payment and dispute resolution which must be complied with in any *"construction contract"* (as defined by the Act). For implications of non-compliance, please see the response to question 3.3.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a "letter of intent", in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Letters of intent are used to kick off the commercial relationship. The term "letter of intent" is not a term of art and whether the terms are legally binding or expressions of intention with no legal consequences, is dependent on the terms of the letter.

Where the contractor is required to undertake some preliminary work or service, employers can issue a letter of limited authority, instructing the contractor to undertake work up to a fixed fee cap with an expiry date. Depending on the progress made on the main contract negotiation, letters of intent can be used to append the main contract terms and entitle the employer (at its sole discretion) to instruct the contractor to commence the main works; the objective being to lock in the form of main contract at the outset and fix some key commercial terms such as the price for preliminaries and rates for overheads and profit.

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

A requirement for public liability insurance is usually found in construction contracts. This insurance will usually cover claims in the event of personal injury or death of a third party arising out of the performance of the construction works, or loss or damage to property other than the works. It generally will not be required once the construction work is completed.

Contractors' all-risk insurance (or contract works insurance) is a requirement set out in most construction contracts. It covers physical damage and/or loss of the works, and will typically cover damage to insured property, business interruption and the insured's liability to third parties (i.e. public liability insurance). Usually, wear and tear will be excluded.

Employers' liability insurance is compulsory for most entities that directly employ employees or labour-only sub-contractors. The policy must provide at least £5m of cover for illness, personal injury or death of an employee, resulting from work done for the employer. There are significant fines for non-compliance (e.g. £2,500 per day).

Professional indemnity insurance is commonplace for professional consultants, contractors with design responsibilities and sub-contractors who are responsible for significant design elements. It protects against liability for damages that result from an error in their services (e.g. by way of negligent design or the negligent performance of sub-contractors).

Product liability insurance is also commonplace, and protects against liability for third-party injury or property damage, from products used in the construction works. This insurance is often required for proprietary materials or technology (e.g. escalators).

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

Whether workers are employees or contractors, employed or self-employed, will impact their treatment for purposes of taxation and their duties with regard to health and safety. Under the Income Tax (Earnings and Pensions) Act 2003 and the Income Tax (Pay as you Earn) Regulations 2003, employers must deduct income tax and employee national insurance contributions from their employees' salaries. The Construction Industry Scheme applies similar rules to certain payments made to contractors in construction contracts. Whilst there is extensive legislation that establishes statutory requirements in relation to health and safety, a key one is the Construction (Design and Management) Regulations 2015, which set out the different duties for each type of worker.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

The regulatory framework for construction works is centred around the Building Act 1984 and the Building Regulations 2010 (the "**Building Regulations**"). The Building Safety Act 2022 received royal assent on 28 April 2022 (although not all of the Act is in force yet) as a key step in an extensive overhaul to building safety legislation following the tragic fire at Grenfell Tower in London.

The Act: (i) introduces new building safety duties for the client, principal designer and contract, contractor and designers; (ii) extends the liability of corporate entities; (iii) sets gateways for higher-risk buildings (with "golden thread" information to be retained for the whole lifecycle of the building); and (iv) introduces changes to the limitation periods imposed by the Defective Premises Act 1972 and the Building Act 1984 (new limitation periods are in force as of 28 June 2022).

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Retention money being deducted or withheld by the employer, to protect it against the contractor failing to complete the works

or failing to remedy defects or other contractually non-compliant work, is a precaution widely implemented in construction projects in the UK. A percentage, typically 3% of the value of the works, is deducted from each interim certificate, with 1.5% of the retention repaid at practical completion and the remaining 1.5% repaid on issue of the notice of making good defects.

It is arguable that under English law the employer is deemed to hold retention money on trust for the benefit of the contractor, and this principle is reflected in the JCT suite of contracts. The implication of such trust arrangement is that the employer cannot treat the retention funds as its own and must comply with laws applicable to trust arrangements.

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor's performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

Performance bonds or guarantees, whereby the surety guarantees in favour of the employer, the due performance by the contractor of its contractual obligations (with the primary purpose of offering protection in respect of the contractor's insolvency), are a feature of UK construction projects. Such bonds or "see to it" guarantees create a secondary liability predicated on the default by the contractor of the underlying construction contract.

Performance bonds will generally be enforced by the courts if claims are properly made in accordance with the terms of the bond. A surety could seek an injunction on a claim if it considers the bond has been discharged due to a variation, waiver or settlement under the underlying contract; which was made without its consent. The terms of the bond should protect the employer against such early discharge.

As an alternative to performance bonds, on-demand bonds (which are akin to letters of credit) provide that the holder shall call for payment by the surety upon giving a notice in the prescribed form, without the need to evidence breach of the underlying contract. On-demand bonds are mostly seen in international projects and English courts have generally refused injunctions to prevent calls on on-demand bonds; the material exception to this rule being where the contractor is able to establish fraud.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Parent company guarantees are permissible and usually requested by employers contracting with a subsidiary company of a parent or ultimate holding company with a stronger financial covenant.

A parent company guarantee must comply with the formalities of a guarantee under English law and, as a secondary liability, requires default of the underlying contract. Employers sometimes ask the guarantor to act as primary obligor in order to protect the guarantee from being discharged due to some technical deficiency in the underlying contract.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Yes in principle, but the status of the goods supplied will define the effectiveness of such rights. If the goods are delivered and installed on site and become incorporated into the land, the goods become the property of the employer (as landowner). If the goods are delivered to the site, a retention of title provision stating that the contractor retains title until the goods are paid for can be effective (especially with a licence to enter the property to retake the goods if payment is not forthcoming), although less so if the goods or materials are mixed.

Under English law, the parties can agree that transfer of title in goods or materials can take place at the same time or at a different time to the date payment is made.

The JCT Design and Build Contract 2016 form provides that the goods or materials will become the employer's property once their value has been included in an interim payment, whereas the NEC 4 Engineering and Construction Contract provides that whatever title the contractor has passes to the employer upon delivery to site (so passing on title depends on the contractor having good title in the goods or materials).

The contractor cannot, without an express right, remove goods or materials from the site. The JCT Design and Build Contract 2016 provides that the contractor is not entitled to remove any goods or materials from the site, even if it has not been paid (subject to the contractor's termination rights on employer insolvency or default).

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

It is common for a third party to be appointed by the employer to supervise the works and administer the contract on the employer's behalf, e.g. in relation to issuing certificates, administering claims and undertaking inspections.

Under English law, the third party must act fairly, independently and honestly in applying the terms of the construction contract. This duty to act fairly is flexible, dependent on the facts and subject to the consultant's duty to exercise reasonable skill and care in the performance of its services.

The employer, having appointed the third-party supervisor, will have a contractual claim for damages for breach of its contractual duty of care, as well as a claim in tort, if it can establish negligence.

The contractor will have difficulty claiming against the third-party supervisor in the absence of a contractual relationship, because of the difficulty in establishing that the third party owed it a duty of care in tort to prevent the contractor from suffering economic loss.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a "pay when paid" clause?

The Construction Act 1996, which applies to *"construction contracts"* (as defined in the Act), makes ineffective any provision making payment conditional on the employer receiving payment from a third party (except if the employer making the payment becomes insolvent).

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

The parties are free to agree ascertained damages for breach of contract in relation to delay or performance. In the real estate development sector, it is common to have pre-agreed damages for failure to achieve the completion date due to contractor culpable delay, whereas contracts in the energy and engineering sector also include ascertained performance damages for failure to meet the performance requirements.

The benefits of using liquidated damages are: (i) it provides certainty about the consequences of breach; (ii) it limits the contractor's liability; and (iii) it saves the employer the time and expense of pursuing claims in general damages for delay or performance failure.

English law has established a number of grounds on which a contractor may challenge the enforceability of liquidated damages provisions in construction contracts. The English courts will decide a liquidated damages clause is penal and unenforceable where the secondary obligation (i.e. the payment of liquidated damages) imposes a detriment on the contractor out of all proportion to any legitimate interest of the employer in the enforcement of the primary obligation (to ensure works are done on time or to expected quality).

Other reasons contractors could successfully resist the application of liquidated damages are: (i) if the breach is outside the scope of the liquidated damages provision; (ii) the liquidated damages clause is held to be uncertain; or (iii) the employer fails to comply with an explicit condition precedent to its right to deduct or levy liquidated damages.

Unlike in some civil code jurisdictions, the courts will not look to revise the rate of liquidated damages agreed between commercial parties, up or down. In the event that the liquidated damages provision is held to be unenforceable, it is advisable for the employer to reserve its right under the contract to claim general damages for the relevant breach.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

The employer can vary the works if it is entitled to do so under the building contract or if there is a fresh contract made between the parties which covers the extra work.

The right to vary work is subject to the variation provision set out in the contract. If a variation instruction results in the works being substantially different to the kind of work contemplated by the contract, the extra work could fall outside the scope of the contract. In such case, the employer could be liable to pay the contractor on a *quantum meruit* basis.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

In a lump-sum fixed-price contract, the contractor is entitled to carry out the entirety of the works instructed, subject to the employer's contractual right to omit any of the works. Unless otherwise stated explicitly in the contract, the right to omit will generally not entitle the employer to use the power to give the work to another contractor (including for a lower price) or to do the work themselves.

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

English law will imply a number of key terms into a construction contract. It will be an implied term in a construction contract that the contractor will: (i) carry out the work in a good and workmanlike manner; (ii) supply and use materials of good quality reasonably fit for the purpose for which they will be used; and (iii) undertake that the completed building is reasonably fit for its intended purpose where that purpose is known and the contractor agrees to both design and construct the works.

The courts have rejected an overarching general concept of an implied duty of good faith, but there are examples of duties of good faith having been implied into some long-term, relational contracts, e.g. a 25-year private finance initiative contract.

Where a *"construction contract"* (as defined in the Construction Act 1996) does not comply with the provisions set out in the Act (e.g. in relation to payment or dispute resolution), the relevant provisions in the Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011 (SI 2011/2333) shall apply. If the contract complies in part, the provisions that comply will continue to take effect, while the Scheme will then only imply terms to replace non-compliant provisions or fill in for missing provisions.

The parties should note that an entire agreement clause could limit the parties' rights to the express terms of the contract and exclude some implied terms.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

The general rule under English law is that where there is true concurrency, i.e. delay to completion caused by more than one matter of equal causative potency for which both the employer and the contractor are responsible, the contractor is entitled to an extension of time but he cannot recover loss and/or expense caused by the delay. The Scottish courts have taken a different approach to concurrency.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

In cases of latent damage (i.e. not personal injuries) caused by negligence, the limitation period is the later of six years from the date the damage is caused, or three years from the date the claimant knew (or ought to have known) the material facts of the loss, the defendant's identity and the cause of action. In such cases, there is a long-stop of 15 years from the date of the negligent act/omission. In some instances where there has been fraud, concealment or mistake, time does not begin to run until the claimant has, or with reasonable diligence could have, discovered this.

A further piece of legislation to consider is the Defective Premises Act 1972 (the "**DPA 1972**") and the recent amendments that have been made to it. The DPA 1972 imposes a duty on those working in relation to the provision of a dwelling to ensure that the work performed and the materials used were adequate, so that the dwelling was fit for habitation when complete. Claims for breach of this requirement originally had a limitation period of six years. This period has now been extended, so that claimants now have 15 years to bring a claim if the claim accrued or accrues after the amendments to the DPA 1972 took effect, or 30 years if the claim was accrued before the amendments were made.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

The principal pieces of legislation here are the Limitation Act 1980 and the Latent Damage Act 1986. With most contracts, time typically begins to run from the date that the cause of action accrues. If the contract is signed as a simple contract, the limitation period is six years, though if signed as a deed then the limitation period is usually 12 years. Prior to commencing a claim, the Court will expect the parties to it to have completed the process set out in the Pre-action Protocol for Construction and Engineering Disputes. Otherwise, notices of a claim are not generally required.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Where a fixed lump-sum contract is silent in respect of ground condition risk allocation (whether in the contract terms or the technical documents appended), the risk of unforeseen ground conditions rests with the contractor. Notwithstanding this general principle, there may be scenarios in which, absent a provision allocating ground risk, the employer assumes liability for unforeseen ground conditions, e.g. if the employer provides replied-upon information that is shown to be incorrect or the contractor can successfully evidence a misrepresentation claim.

Some standard-form contracts such as the JCT suite are silent on ground condition risk (which means the common law position would apply), while other forms such as the NEC suite of contracts provide limited circumstances in which additional time and cost incurred in dealing with unforeseen ground conditions would entitle the contractor to a compensation event. In design and build procurement, it is common for employers to try to allocate some or all of the unforeseen ground condition risk to the contractor.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

It is common for construction standard forms to provide contractors with time and cost relief if there is a change in law affecting the completion of the works.

A good example is that the JCT Design and Build Contract 2016 provides that, if after the base date (usually the date on which the contractor tenders its price and programme) there is a change in law which necessitates an alteration or modification to the works, the contractor is entitled to a variation (entitling the contractor to an extension of time, loss and/or expense and potentially the agreed rate for profit).

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The contractor will typically own the intellectual property in the documents it has produced pursuant to the construction contract. The market approach is for the contractor to provide in favour of the employer (and any beneficiary entitled to third-party rights) an irrevocable, royalty-free, non-exclusive copyright licence to use the documents for the permitted purposes.

3.10 Is the contractor ever entitled to suspend works?

In respect of any *"construction contract"* (as defined under the Construction Act 1996), the contractor has a statutory right to suspend performance of his obligations under the contract where any sum due under a construction contract is not paid in full by the final date for payment and no effective "pay less" notice has been given. For construction contracts outside the scope of the Construction Act 1996, the parties are free to entitle the contractor to suspend the works for non-payment, breach or employer insolvency.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Construction contracts normally contain a contractual right to terminate the contract upon the occurrence of such events as insolvency or the consistent failure to make payment by the employer. To terminate the contract in this way, there will typically be a contractual requirement to provide multiple notices to the party allegedly in breach. If a breach is so significant as to deprive the

innocent party of substantially the entire benefit of the contract, then this party may be able to "repudiate" the contract. In such circumstances, no notice is required; however, the innocent party must take care not to "affirm" (i.e. continue with) the contract. Instead, the party must, through its communication or conduct, unequivocally demonstrate that it is treating the contract as being at an end.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

Whether a construction contract includes a "termination at will" provision is a commercial matter between the parties. The consequences of the employer terminating the contract at will can vary between: being required to pay for completed work up to the date of termination but with a complete exclusion for loss of profit; and the claim for profit being permitted but up to a capped position (e.g. 5% of the contract price).

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

The term *"force majeure"* does not have a recognised definition in English law. It is generally regarded as a contractual term by which one (or both) of the parties is excused from performance of the contract, in whole or in part, or is entitled to suspend performance upon the happening of a supervening event beyond its reasonable control. A *force majeure* clause is usually intended to avoid the application of the common law doctrine of frustration. In the JCT 2016 suite, the term *"force majeure"* is used without definition but does entitle the contractor to an extension of time (but not cost) and allows either party's employer to terminate the contract in the event of prolonged suspension (the default period being two months) of the whole or substantially the whole of the incomplete work due to *force majeure*.

A change in economic or market circumstances which makes the contract less profitable is not generally regarded as sufficient to entitle relief under a *force majeure* clause.

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

No such legislation is applicable in England & Wales. Construction guidance in the form of Site Operating Procedures introduced by the Construction Leadership Council has been used by the construction industry as best practice, and any time or cost relief in construction contracts for delay due to COVID-19 has been a matter for commercial negotiation between the parties.

Other remedies that may be available to the parties are dependent on the terms of the contract. By way of example, remedies available under the JCT suite of contracts could be: (i) delays in the supply chain caused by government-mandated shutdowns could fall within the scope of a change-in-law provision providing specific remedies; (ii) delays in obtaining a necessary permission or approval of any statutory body could entitle the contractor to time and cost; and (iii) contractors may request instructions to close the site which, if given, could amount to a variation.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

It is not usual for any parties who are not privy to a contract to have the benefit of it.

However, certain parties that were not privy to a contract between an employer and a professional consultant, for example, may still be aggrieved by (in)actions of either party. They may be offered security by means of collateral warranty, or through the Contract (Rights of Third Parties) Act 1999. Under section 1 of this act, a non-party may be granted a benefit such as the right to enforce a term without the need for a collateral warranty. To obtain such a benefit, the third party must be expressly identified by the contract, although it need not be identified by name. Classes such as funders, tenants or purchasers may be referred to.

The JCT's Standard Form of Building Contract with Contractor's Design 1998 Edition (incorporating amendments 1999, 2000, 2001, 2002 and 2003) confirms that no party who is not a party to the contract can enforce any of its terms (unless expressly permitted under the contract) and the same is true of the JCT 2016 (SBC/XQ 2016, Standard Building Contract Without Quantities, 2016). It is not uncommon for contracts to exclude the Contract (Rights of Third Parties) Act 1999.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

Since a landmark legal decision severely restricted the ability of third parties to recover pure economic loss in the tort of negligence for defects in the works, there has been a surge in the use of collateral warranties or direct agreements in the English construction sector. It is expected that most construction contracts will require the contractor to enter into a separate deed of warranty, in favour of a defined category of third-party beneficiaries, under which the contractor warrants that it has performed and will continue to perform its obligations under the contract. As an alternative to collateral warranties, third-party beneficiaries can be afforded third-party rights in a construction contract pursuant to, and in accordance with, the Contracts (Rights of Third Parties) Act 1999.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

The right of set-off under English law is a defence (a shield not a sword) and a defendant must counterclaim if it hopes to obtain more than the claimant will obtain on its claim. Set-off is available as an equitable right (which is fairly wide) and the parties

may provide for a contractual right of set-off or deduction, which is frequently found in building contracts.

The Construction Act 1996 effectively acts as a statutory exclusion of the right of set-off in *"construction contracts"* (as defined in the Act) if the requisite "pay less" notice has not been served in respect of a payment applied for by the contractor.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

The contractor owes its employer a contractual duty (either express or implied) to carry out the work and, separately, to carry out design services (if any). A concurrent duty of care will also be owed in the tort of negligence (see below). Claims against the employer for breach of its obligations will ordinarily be made as a breach-of-contract claim, given the nature of the employer's obligations.

Subject to the terms of the contract, the contractor can owe a concurrent duty in contract and tort. An employer may wish to sue in tort to avoid a claim being time barred in contract. To establish a claim in the tort of negligence, the employer must find the existence in law of a duty of care, a breach of such duty and a connection between the defendant's behaviour and the damage (which cannot be so remote or unforeseeable as to be unrecoverable).

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

There are no rules to this effect that are specific to construction contracts as a whole. Whilst most construction contracts follow a standard format, thereby reducing the likelihood of any ambiguities arising, where ambiguities do arise, the general principles of contract law apply. As summarised in the case of *The Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163 (Comm), the principles that the courts will consider when interpreting a contract include: the objective meaning of the language; the available background information; the need to consider the contract as a whole in the light of the nature, formality and quality of the drafting; the court's entitlement to prefer an interpretation of the contract that is consistent with commercial common sense; the need to carry out an iterative analysis of how each suggested interpretation compares to the provisions of the contract; and the requirement to balance these principles.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

In addition to liquidated damages (which are held to be penal) and any terms non-compliant with the Construction Act 1996 in respect of *"construction contracts"* (as defined in the Act), the Unfair Contract Terms Act 1977 imposes limits on the extent to which civil liability for breach of contract, or for negligence or other breach of duty, can be avoided; for example, exclusions of liability for personal injury or death are unenforceable.

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

The standard of care imposed on a professional consultant at common law is to carry out its services exercising "reasonable skill and care". The test is that of the ordinary competent professional carrying out the relevant discipline.

In design and build contracts, it is implied that the completed works will be reasonably fit for the purpose for which they are required. Often contractors require an exclusion from fitness for purpose liability on the basis that such liability is not covered under its professional indemnity policy, but accepting a blanket exclusion for fitness for purpose could conflict with any contractual requirement to meet specific performance requirements.

The courts have reconciled dual obligations within the same contract to exercise reasonable skill and care in the performance of the services, alongside the requirement for an absolute guarantee to achieve specific output.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Decennial liability does not exist in England & Wales. Latent defects insurance, the policies for which normally cover a period of 10 or 12 years, is sometimes referred to as decennial insurance. However, unlike in many of the countries where decennial liability exists, there is no mandatory requirement for such insurance in England & Wales.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Construction disputes are generally resolved through negotiation, mediation, adjudication, litigation or arbitration. In the UK in 2021, the most common method of alternative dispute resolution was adjudication, followed by party-party negotiation and finally, expert determination.

Following an adjudication (a compulsory dispute mechanism for the construction industry), the decision will be "interim-binding", i.e. it will bind the parties until the dispute is resolved via arbitration, legal proceedings or agreement. The adjudicator's decision will usually be enforced by the successful party in the Technology and Construction Court and is unlikely to be challenged by the losing party.

Mediations involve an independent third party (the mediator) receiving a statement from both parties; the mediator will try to find common ground for achieving a settlement – their decision will not be binding.

Expert determination provides a binding outcome following an expert's review of the dispute.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

Adjudication processes exist in England & Wales under section 108 of the Construction Act 1996. The Construction Act 1996

gives a statutory right to parties to a construction contract to refer a dispute for adjudication. This statute also specifies several requirements that the compulsory adjudication clause in the construction contract must comply with. These include a requirement for the adjudicator to reach a decision within 28 days of referral (or longer if the parties agree to this) and for a duty to be imposed on the adjudicator to act impartially.

As required by the Construction Act 1996, the contract must provide that the decision of the adjudicator is binding until the matter is determined by legal proceedings, arbitration or agreement. If these requirements are not met by the contract, the relevant provisions of the Scheme for Construction Contracts (England and Wales) Regulations 1998 apply, which ensures that the statutory requirements relating to the adjudication process are incorporated into the contract.

The alternative interim dispute resolution procedure to standard adjudication is a dispute review board. This is effectively a project-specific adjudication process whereby, at the beginning of a construction project, a panel is appointed, whose role is to visit the construction site several times and provide an interim binding decision on any disputes that may have arisen.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

Although they are not compulsory, arbitration clauses are usually found in standard-form contracts (the JCT, Standard Form of Building Contract with Contractor's Design 1998 Edition (incorporating amendments 1999, 2000, 2001, 2002 and 2003) provides that a dispute may be resolved by reference to arbitration; the JCT Design and Build Contract 2016 also provides that subject to an adjudication clause, disputes or differences shall be referred to arbitration). Where an arbitration clause is included, one party will serve on the other a notice of arbitration that sets out the dispute. The notice will also require the other party to agree to the appointment of an arbitrator. The arbitrator will make a decision by way of a final and binding arbitration award.

If a dispute arises in relation to an arbitration award (i.e. those applications to the court under the Arbitration Act 1996 to challenge the arbitration award), the claim will normally be referred to the Technology and Construction Court. Here, section 10 of the Technology and Construction Court Guide should be considered when approaching the arbitration process.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Under the New York Convention, the English courts must recognise and enforce foreign arbitration awards where there is an application for recognition unless a ground for refusing recognition (under section 103 of the Arbitration Act 1996) is made out. These grounds permit refusal in events such as: a party to the arbitration agreement was under some incapacity; or a party was not given proper notice of the arbitrator's appointment.

Practical obstacles may therefore include maintaining a record of the arbitration process and ensuring that any requirements in the arbitration clause are followed and recorded. A party may also face obstacles in enforcing an arbitration award where the counterparty's assets are not located in a New York Convention jurisdiction. A party may face legal obstacles to recognising or enforcing an arbitration award if recognising or enforcing the award would be contrary to public policy.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Generally, parties to a construction contract will need to comply with the Pre-Action Protocol for Construction and Engineering Disputes (as well as the Practice Direction on Pre-action Conduct and Protocols) prior to commencing a claim.

England & Wales has a specialist construction court within the Business and Property Division known as the Technology and Construction Court (the "**TCC**"). Proceedings are commenced by the issuing of a Claim Form. The Claim Form must be served within four months of issue, otherwise it expires. Following service of the Claim Form, Particulars of Claim must be served within 14 days, provided they are served within four months of the issue of the Claim Form. A defendant must then file an Acknowledgment of Service or a Defence within 14 days. If an Acknowledgment of Service is filed, the defendant then has 28 days from service of the Particulars of Claim to file its defence.

The TCC Guide confirms that where a case is transferred to the TCC, the first Case Management Conference (the "**CMC**") will be fixed by the court within 14 days of the case being transferred. The parties will need to file and serve a disclosure report no less than seven days before the first CMC and should seek to agree proposals for disclosure and costs budgets no less than seven days before the CMC. Unless the court prepares an order, the claimant/applicant will need to submit a draft order for the judge to approve within seven days of the hearing. The parties will then conduct disclosure (obtaining and reviewing documents). Witness statements and expert reports will then be exchanged. Subject to any interlocutory hearings, the next substantive hearing will be the pre-trial review, which will be followed by the trial. Getting to this stage will depend on the parties' agreement as to how long individual steps will take.

A party opposing a decision by the TCC may appeal a decision that is wrong (i.e. if the decision contained an error of law/fact or incorrect exercise of the court's discretion), or if the ruling is unjust due to a serious procedural (or other) irregularity. A decision may be appealed to the Court of Appeal and, following that, the Supreme Court. Applications for permission to appeal to the Supreme Court will usually be decided without a hearing. Decisions at this stage may take weeks, months or years to receive.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

The jurisdiction of England & Wales has several enforcement regimes, whereby the judgments of courts in certain other jurisdictions will be upheld and enforced in the courts of England & Wales. These include the Hague Convention on Choice of Court

Agreements (which covers EU Member States), the Administration of Justice Act 1920 (which covers several countries with historic links to Britain) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (which covers several countries including Australia and the majority of Canada).

For those jurisdictions not covered by an enforcement regime, the common law rules must be applied to determine if the judgments of that jurisdiction's courts will be upheld and enforced. These rules hold that such judgments will be treated as though they have created a contract debt between the parties in question. As such, an action for a simple debt will need to be brought in England & Wales by the creditor. This procedure is only available where the foreign court's judgment was final and conclusive.

Alan Stone is a specialist construction and engineering lawyer. Alan's practice sees him acting for some of the largest construction and construction consultancy companies operating in the UK and abroad. He ensures that when these entities are faced with the most complex and challenging issues, they have the right advice and strategy to resolve them, with exceptional outcomes for his clients. Matters on which he advises include final and interim account disputes, variations, delay claims, defect claims and dispute avoidance.

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