HERBERT SMITH FREEHILLS

INSIDE CONSTRUCTION AND INFRA

PERSPECTIVES ON GLOBAL CONSTRUCTION AND INFRASTRUCTURE DISPUTES

IN THIS ISSUE

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WELCOME

Welcome to the first issue of Inside Construction and Infra, Herbert Smith Freehills' magazine for all those involved in designing, procuring, building, owning or operating fixed assets.

The world we operate in is changing rapidly. The scale and complexity of projects continues to grow, and technology increasingly impacts on workflows. Established markets are changing as uncertainty comes from events such as Brexit, and new markets are opening as sanctions against Iran are reduced. Increasingly, the market is globalised with EPC contractors working simultaneously on projects in Brazil, South Africa, Saudi Arabia and Thailand while investors build, own and operate assets in every continent. Sustainability is ever more important, and renewable energy projects are coming to the fore with clients developing wind, solar, hydro, marine and bio-fuel assets.

Against this background of change and internationalisation, there is great scope for misunderstanding (deliberate and accidental) and it is timely to launch our disputes team's first global publication specifically for the Construction and Infrastructure industry.

We open this edition by looking at changes to the regulatory regime governing the Australian EPC market where state and federal governments have focused on guaranteeing the security of payment for contractors and subcontractors. "Pay when paid" clauses are now barred throughout the country and some states have requirements for payments to be made within set periods from the contractor's claim – though not all states have followed suit, and the rules differ between New South Wales and South Australia. Australia has also seen the adoption of innovative project bank accounts, at least on government projects. Cash flow is, of course, the life blood of construction. Will the Australian reforms ultimately make a difference to payment and will other nations adopt similar reforms?

We also consider the risks and opportunities in UK transport and infrastructure post-Brexit. In a detailed report on discussions which the firm hosted, chaired by Ben Rigby of Commercial Dispute Resolution and featuring senior representatives from Bectel Ltd, Crossrail, Hill International, Jacobs Engineering, John Laing Group, London Luton Airport and Thames Tideway, we look at the move away from a binary choice between litigation and arbitration to the wider adoption of ADR and the suggestion that Brexit may promote the relocation of construction businesses to the UK.

Many readers will be familiar with the provisions which are now in the ICC Arbitration Rules for Emergency Arbitrators, however fewer will we suspect have seen those provisions used in anger. Drawing on our experience in an emergency arbitration with an English seat, but arising from a MENA construction project, we look at how the process worked and whether it delivered on the promises of speed and efficiency.

Finally, we talk to some of those working in our global practice. Mike McClure, who heads our disputes practice in Seoul, speaks about his time in offices around the world and how this fits with his practice now assisting Korean businesses in projects often based in regions where Mike was previously based. Brad Strahorn, a partner in our Sydney disputes team, talks about the impact of increasing participation of international contractors in the Australian market, and of the move in investment from mining projects to infrastructure. Finally, Simon Caridia, from our London corporate team speaks of his work in PPP and of his experience of project finance on some of the biggest transactions following his work on the UK's M25 at the time of the collapse of Lehman Brothers.

We hope that there is something for everyone in this first edition of Inside Construction and Infra and that you will let us know if there are any topics you would like to see addressed in issue two.

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GOOD NEWS FOR EPC CONTRACTORS IN THE AUSTRALIAN MARKET: **DEVELOPMENTS AND TRENDS IN SECURITY OF PAYMENT LEGISLATION**

In Australia, both State and Federal governments have acknowledged the need to improve security of payment for EPC contractors and subcontractors. The consequent regulatory and legislative changes stand to benefit EPC contractors looking to enter the Australian market, but they must familiarise themselves with these changes. In this article, **Ante Golem, Dan Dragovic, Jake Reynolds and Lauren Claxon** of the Perth office analyse the key reforms introduced, including changes to legislation, the introduction of Project Bank Accounts (PBAs) and changes to the statutory adjudication process. They also discuss the further review and reform in security of payments laws expected in the coming few years.

In recent years, regulatory change has been a feature of the Australian EPC contracting market. Much of the change will be welcome news to EPC contractors either in, or looking to enter, the Australian construction market.

State and Federal governments in Australia have acknowledged the need to improve security of payment for EPC contractors and subcontractors alike. The legislative and regulatory response has largely been aimed at reducing the vulnerability of subcontractors to the actions of supposedly unscrupulous or financially fragile contractors. As the changes almost invariably do not discriminate between small and multi-national contractors, large global EPC contractors stand to benefit from the wave of regulatory reform.

Given the pace of change in the market, it is imperative that global EPC contractors, particularly those looking to enter the Australian market, familiarise themselves with the recent changes. This article provides an overview of the key changes, an insight into the current regulatory environment and where it may be headed.

Underpinning much of the legislative reform in this area is the desire to ensure that contractors and subcontractors are paid in a timely manner. This is in response to some developments in the market emerging from both the construction boom and subsequent downturn, particularly in the resources sector. The boom led to the emergence of some 'unscrupulous' practices (eg "pay when paid" provisions) and the downturn led to some undesirable outcomes for subcontractors resulting from the insolvency of head contractors. The key reforms may be summarised as follows:

- ensuring reasonably prompt payment to contractors;
- use of project bank accounts on certain government infrastructure projects;
- improvements to the adjudication process; and
- educating the industry.

Ensuring that subcontractors are paid in a reasonable and timely manner

Pay when paid provisions have been prohibited in all Australian jurisdictions. In addition, New South Wales and Western Australia have recently amended legislation so that payment must be made within 30 days and 42 days respectively of a payment claim being made.

The Western Australian and Federal governments have both recently passed reforms which will introduce codes of conduct aimed at ensuring, amongst other things, compliance with relevant security of payment laws. The Western Australian *Building and Construction Industry Code of Conduct 2016* aims to ensure compliance with the *Construction Contracts Act 2004* (WA), whereas the *Federal Code for Tendering and Performance of Building Work 2016* (**Federal Code**) applies across all State jurisdictions.

While both codes seek to ensure that subcontractors are paid in a reasonable and timely manner, they also seek to regulate industry conduct more broadly. This approach reflects the broader push to change the culture of the construction industry. A key aspect of this trend has been a recognition that more needs to be done to educate contractors and subcontractors about their obligations, rights and enforcement options when it comes to security of payment.

The broader use of project bank accounts for government construction projects

Some Australian jurisdictions have been trialling the use of Project Bank Accounts (**PBAs**) for selected government construction projects.

At a high level, PBAs are trust accounts from which payments are made by a principal directly and simultaneously to the head contractor and subcontractors involved in a project.

PBAs offer the following benefits to subcontractors:

- head contractors are prevented from delaying or withholding payment to subcontractors; and
- the trust status of a PBA protects subcontractors in the event that a head contractor becomes insolvent.

In November 2013, Western Australia commenced Australia's first trial of PBAs on selected government projects. The success of this trial resulted in the Western Australian government announcing in late 2016 that it would adopt PBAs on a wider range of infrastructure projects.

Other States and Territories have since followed suit. In late 2014, the New South Wales and Northern Territory governments announced that PBAs would be used for selected government projects. Last year, the Queensland government announced that PBAs will be used on all government projects with a value between $1 million and $10 million from the start of 2018. The Queensland government has also stated that from 1 January 2019, every project over $1 million will be required to operate a PBA. The fact that the Federal Code mandates compliance with any State requirements relating to PBAs underlines this growing trend.

While there has been greater acceptance of the benefits that PBAs can provide, to date their use has been limited to government projects. Further, while the uniformly adopted language of 'trial' suggests that State governments may eventually mandate the use of PBAs for large private construction projects, to date this has not been the case. Nonetheless, contractors tendering for government projects in certain States of Australia should familiarise themselves with the differences in the payment process when a PBA is used, as opposed to an ordinary head contractor's bank account.

A main contractor's commercial position against subcontractors is very different in a PBA project to the norm in the common law world.

Adjudication reforms

The improvement of the statutory adjudication process under security of payment legislation in Australia has been, and continues to be, a key reform issue, focused on providing a rapid dispute resolution process for the industry to "keep the money flowing". Both the Western Australian and Queensland governments have recently made such reforms to their respective legislative regimes, which have included:

- broadening the application of security of payment act provisions;
- increasing procedural timeframes; and
- simplifying the process for the enforcement of adjudication determinations.

The recent amendments to Western Australia's *Construction Contracts Act 2004* (WA) have shifted the balance further in favour of applicants. Applicants now have 90 business days to submit an application for adjudication, a significant increase from 28 calendar days.

The scope of the adjudication process has also been broadened in Western Australia, by narrowing the restriction on mining activities being considered construction works for the purposes of the legislation. Further, it is now simpler in Western Australia for the successful party in an adjudication, more often the applicant, to enforce an adjudication determination, with the requirement to seek leave of the court being removed.

The Queensland Government also made some amendments to its adjudication process, and although Queensland's *Building and Construction Industry Payments Act 2004* remains, on the whole, claimant friendly, the amendments passed in 2014 levelled the playing field somewhat by, amongst other things:

- extending the timeframes for contractors to respond to payment claims in excess of $750,000 (**Complex Claims**), which can be further extended at the discretion of the adjudicator;
- allowing the provision of additional information to an adjudicator for Complex Claims, including reasons for withholding payment; and
- allowing contractors a second chance to lodge a payment schedule in response to a payment claim.

These amendments serve to reduce security of payment for subcontractors, particularly for Complex Claims. Contractors can now delay payment for longer periods and adopt delaying tactics during the adjudication process.

Industry training and education

In recent years, entry of a number of smaller subcontractors in the Australian construction industry has opened the industry up to persons who may not have appropriate or adequate skills to successfully operate such businesses. Experience has shown that many of the issues which may arise for industry participants are caused by a lack of understanding of industry practices, key processes and provisions of the relevant contract and the legal framework.

As a result, there is a push for education and training to be used as both a complementary measure to legislative and policy changes and also to mitigate issues such as subcontractor insolvency and payment disputes. While there has been limited implementation of official education and training programmes in Australia to date, a number of reports and discussion papers suggest that it should be a key area of focus for the industry.

The Western Australian government has directed its focus to education and training through the Department of Commerce - Building Commission. The Building Commission currently provides resources for builders and subcontractors on its website with a description of the key pieces of legislation affecting these participants, focusing on the security of payment regime.

Watch this space

In recent times, reports, discussion papers and inquiries into the construction industry, both at the State and Federal level, have been part of the regulatory landscape. This is set to continue with the Federal government announcing in late December 2016 a further review of security of payments laws in the building and construction industry. The review is to deliver a final report by 31 December 2017.

The reports to date have largely identified the same issues with security of payment in the construction industry, namely:

- inadequate cash flow and poor industry payment practices;
- retention money being used by contractors to rectify cash flow problems rather than for defects;
- subcontractors and their employees bearing the brunt of insolvency in the industry; and
- a general lack of business acumen, financial management skills and legal knowledge in the industry.

While the measures discussed above go some way towards addressing these concerns, further changes are to be expected. For example, in New South Wales:

- recent regulatory amendments require that head contractors working on projects with a value in excess of $20 million maintain retention money in a trust account. These regulations, amongst other things, regulate how and when retention money is to be withdrawn as well as prohibiting these funds from being used by the head contractor to pay their own debts; and
- recent legislative amendments introduced a requirement for head contractors to attach a 'supporting statement' to every payment claim they submit. The supporting statement must set out proof of payments to subcontractors and effectively operates as a precondition to receiving next payment by the principal.

Conclusion

Global EPC contractors looking to enter the Australian market need to be aware of the recent regulatory developments in the Australian EPC contracting market. On the whole, the recent changes have sought to address some challenges facing vulnerable subcontractors particularly arising out of the actions of unscrupulous or financially unsound contractors. This is especially true of Government projects through the use of PBAs. Further changes are on the horizon with the Federal government's review of security of payments laws in the Australian building and construction industry to be completed by the end of 2017. Given the changing regulatory framework in this area, advice on the state of the market remains essential.

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TRANSPORT AND INFRASTRUCTURE POST-BREXIT – RISKS AND OPPORTUNITIES

Herbert Smith Freehills recently hosted a round table dinner on dispute resolution issues for corporate counsel in the construction and infrastructure industries.

The event was chaired by Commercial Dispute Resolution (CDR)'s editor-in-chief Ben Rigby, under the Chatham House Rule for the guests, who included Gabrielle Hurley of Bechtel Limited, Mark Fell of Crossrail, Franco Mastrandrea of Hill International, Mike Norris of Jacobs Engineering, Carolyn Cattermole of John Laing Group, Nick Barton of London Luton Airport, and Tracey Lee of Thames Tideway.

Managing disputes effectively

Opening the debate, Mark Lloyd-Williams, head of construction and infrastructure disputes (London) at Herbert Smith Freehills, couched his description of the landscape for construction sector dispute resolution as "one in which most clients are looking actively to manage out their disputes".

"Making new law in the Supreme Court is very rarely top of their agenda," he said, "what they're looking for is pragmatic, focused, commercially aware advice which leads to an advantageous commercial solution at the earliest opportunity".

He added: "The old days of 'we've got no option but litigation or arbitration' have long since gone, so alternative dispute resolution (**ADR**), early involvement of expert and experienced neutrals, that, to my mind, is where the industry has been going for the last 20 or more years, and it's never been more relevant than today."

Ann Levin, also a partner at the firm specialising in construction and infrastructure disputes, added her voice, saying that she felt that "adjudication has been something of a game-changer in the construction industry", which had taken away a lot of disputes from the Technology and Construction Court, the High Court and from arbitration, "adjudication has made a big difference in the construction industry".

One attendee agreed, saying: "There is advantage in having a dispute resolution process which is efficient and gets increasingly useful and sensible decisions from our qualified adjudicators."

> "Making new law in the Supreme Court is very rarely top of their agenda"

For his part, David Nitek, another construction and infrastructure disputes partner at the firm, said: "Germany is the most interesting one for me because that's, I think, the first civil jurisdiction to take on adjudication. So far, every other international jurisdiction that's gone that way is a common-law jurisdiction. I think the spread into the civil law world could be quite significant."

Disputes partner James Doe took a different tack, referencing the firm's work with the Global Pound Conference (**GPC**), where the in-house audience of attendees had stressed efficiency as one of the key drivers in choosing how to resolve disputes, noting that: "It's not necessarily the result and it's not necessarily the forum. It is how you get to a resolution in an efficient way."

Adjudication, he said, was popular thanks to efficiency; although "sometimes it's rough and ready but you get certainty, you get it quickly and you get it relatively cheaply".

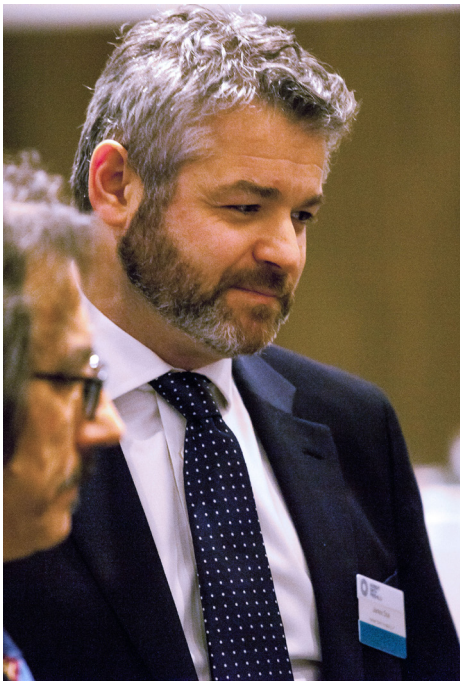
If there were flaws – which Levin identified, saying there were instances where adjudication "actually shouldn't have been used at all", then Doe said "often that is down to the adjudicator not properly controlling the process".

It was clear from the discussion that, where parties took a constructive approach to the subject, adjudication as a process was "something that can be better managed, even on very large projects and very large disputes", chiefly through the better definition of particular issues, breaking up the disputes in that way, into a number of very discrete disputes, which would change the balance of the disputes if the whole process is managed well.

Despite this, another counsel argued that the right to go to adjudication at any time has led to it being sometimes overused, and warned against clients and representatives who drag disputes out as long as possible.

Gabrielle Hurley
Bechtel Power

Mark Lloyd-Williams
Herbert Smith Freehills



James Doe
Herbert Smith Freehills

"In an international context I think it's very complex and there are all sorts of different issues in managing a dispute," they said, continuing, "that's why it's very important, particularly on big projects where there's a lot at stake and these issues are there to have a fast track into dispute resolution".

As Doe pointed out, another aspect of the GPC series was the need to characterise one's role, less as an advocate for the client, and more of a collaborator, so that the parties can decide procedure in a sensible way, allowing each side's lawyers to bring parties together better in finding what Levin called "a business solution".

> "In an international context I think it's very complex and there are all sorts of different issues in managing a dispute"

That said, it depended on the circumstances of the dispute; financial necessity might be one factor, which determined not just the reason for bringing the dispute, but also the reason for continuing it, and the point at which it can be settled or not. That might include needing a precedent, for example, over an interpretation of the contract.

Brexit and the construction industry

The biggest question occupying businesses and law firms in the United Kingdom and Europe over the past seven months has been the impact of Brexit. Nitek said he was "relatively relaxed about the impact".

While there would be changes in the relevant regulations concerning the mutual enforcement of judgments, going forward, he felt, there would be reciprocity of recognition as something relatively high on the agenda, and in any event, acquiring recognition would not be "a particular challenge", saying that while it might be more complex and less homogenous, the other systems had well-developed legal frameworks.

Opinion was divided among the in-house counsel, with some doubting that it would have the effect that many have predicted, or as one put it: "It was all okay before Europe so it shouldn't be disastrous now."

"The Europeans have been exposed to the UK way of doing things. Not just in dispute resolution, in the standard forms of contract, FIDIC, and increasingly the idea that experts should be independent of parties is gaining traction in most jurisdictions where, frankly, the idea would have been alien," said one counsel, who went on to argue that Britain's exit could actually entice more construction related business to London for its technical and banking skills.

"Those sorts of concepts, ideas and standards will be things that the Europeans will miss,"

> "It was all okay before Europe so it shouldn't be disastrous now"

they said, "they'll see the UK not being part of something that they could be learning from and taking huge advantage of. So it will, increasingly, I suspect, come to London. Because the skill set is here".

Doe pointed out that the attraction of London lay in the strength of the institutions; not least the quality of the judges, which he pointed out, had convinced Russian and CIS clients.

Ongoing issues post-Brexit

If there were tensions over choice of law, with equipment suppliers trying to prefer local law over English law, then, Tim Healey, a non-contentious construction partner at HSF said, perhaps the biggest challenge for construction, post-Brexit, would be the change of the law on exiting the EU, particularly on long-term construction projects.

EU law has played an important role in the procurement of major projects, whether state aid or concessions for work and services, explained one attendee, an area in which the UK took a lead in developing the framework for a level playing field.

> "The UK does not want to be a lawless, uncompetitive regime that gets the backs up of its European neighbours"

Although proposals for what comes afterwards remain vague, there is an expectation that the new UK regime would favour local suppliers and contractors, although this could cause problems.

On state aid, however, it is expected that there would be similar regulations to those currently in place: "The UK does not want to be a lawless, uncompetitive regime that gets the backs up of its European neighbours," explained the attendee, adding "there is perhaps a thought that things will not absolutely move away from the European model".

Patrick Mitchell, the firm's global head of infrastructure said that he felt that there would be an ongoing dialogue between advisors and their clients and between law firms in sharing knowledge and get a sense of what is emerging.

Likewise, Simon Caridia, also a corporate infrastructure partner, like Mitchell, said that, while there would be continued uncertainty over the advice to give, over time, there would be a need to deal with things like "pre-existing contracts that refer to institutions that no longer apply or law that no longer applies".

Caridia said: "If there's a clear process as to what you do in that situation then the answer is clear and we know what happens." If not, he said, there would be questions of how matters might change, for example in terms of power-based infrastructure, which is considerably influenced by European regulations.

One party bullishly argued that little would change and that the alarm over the fate of UK businesses was exaggerated, other than adding a little risk to their business model:

> "The number of players who want to invest in infrastructure in this country is a growing pool..."

"Our influence and what we can do is something we completely undervalue. London, at the moment, is the best postcode in the world bar none. Nowhere comes close. You can take that from an industry perspective, a legal perspective and an educational perspective."

Working within the infrastructure and construction sectors, the attendees were positive about the current scale of UK government investment, which they felt would ensure plenty of work for the next few years, regardless of Brexit.

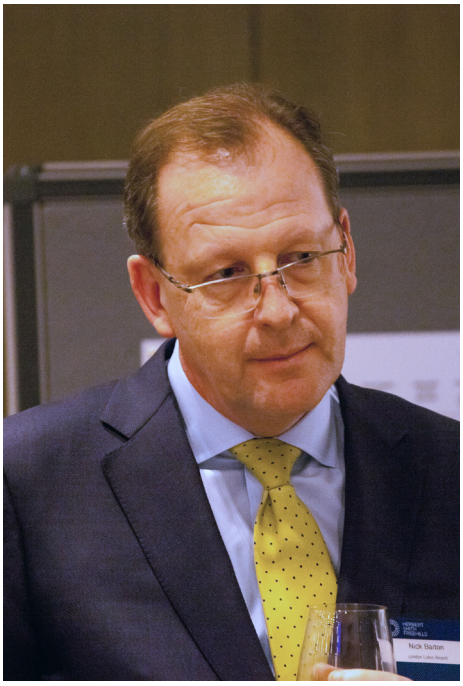
"The number of players who want to invest in infrastructure in this country is a growing pool, who want to come in, and when you're looking at investors from the UK, Europe, China, it's a very, very buoyant market at the moment," explained one participant.

Carolyn Cattermole
John Laing Group

Mark Fell
Crossrail

Franco Mastrandrea
Hill International

Tracey Lee
Thames Tideway



Nick Barton
London Luton Airport

Ann Levin
Herbert Smith Freehills

More generally, it was felt there were continued opportunities for the sector; be it in terms of railways, with High Speed 1 and High Speed 2, or Heathrow; as one guest noted: "Government is obviously focused on the

> "In dispute resolution, common sense seems to be much more important now than abstract, theoretical stuff"

sector as a driver for growth. From my perspective, things have never looked better for the construction sector."

Mitchell agreed, qualifying: "There will be a decent pipeline of infrastructure projects going forward and I don't currently see Brexit having an impact."

Caridia was excited about the infrastructure opportunities in the UK, because of the opportunity to bring them back home again, citing the cyclical use of PFI projects over the last 10 to 15 years, with work shifting from being mostly UK-based to mostly international, and now, potentially, back again.

He said: "We've never really managed to match the number of projects with the appetite of both equity investors and debt providers." Post-financial crisis, he said, "the amount of money in the market now looking for projects is enormous... if we're able to tap into and turn on enough projects in the UK, I have no doubt that both the equity investors and the debt providers will be there".

Teamwork in infrastructure disputes

The presence of several in-house lawyers gave an opportunity to discuss their role. The consensus was overwhelmingly that the in-house lawyer needs to recognise their place in the bigger picture.

"The legal person is core to the team, but it is a team and we work and knock around ideas," said one in-house lawyer. Risk managers and their trade are particularly valuable, the other attendees agreed. One senior figure explained that nothing can be taken for granted; pointing out that Lehman Brothers had a detailed risk assessment, yet collapsed.

This was universally accepted, with one attendee saying the best approach is to "continually interrogate things to ensure that what's being done should be done", while another pointed to the importance of having technical assessments from engineers.

Another delegate summarised the general consensus: "It is not just about the lawyers. The lawyer is one of the team. But it's about the experience, it is about the different disciplines, different countries. You learn from what you've seen before, drawing on advice from engineers, and learning from constant challenges. It's trying to imagine all the things that could go wrong... it is certainly a multi-disciplinary team."

> "There will be a decent pipeline of infrastructure projects going forward and I don't currently see Brexit having an impact"

As to how risk management affects dispute resolution, one counsel observed that the rise of a common-sense approach had made a significant improvement, moving past the problem of warring experts with different opinions.

"In dispute resolution, common sense seems to be much more important now than abstract, theoretical stuff," they said, concluding: "We've come a really significant long way from that now, where the judges and arbitrators are encouraging people to look at it from a common sense, practical view."

Mitchell added: "I think there has been a tendency, when assessing risk in infrastructure projects, to focus disproportionately on the front end risks, such as construction, without enough attention being given to risks during the operational period."

"I think that many sponsors and investors are increasingly spending more time assessing potential risks which might arise during the operational and maintenance phase too," he concluded.

The discussion then moved to consider the implications of, and complexities in dealing with, the New Engineering Contract (**NEC**) provisions. It was acknowledged that the provisions were now widely understood and adopted, although people were still adjusting to its use internationally.

Doe gave an adviser's view of the NEC contract, illustrating with an anecdote how that process was being handled by international contractors, saying that "it's fascinating to see where NEC3 is going to take us. Where it's going to go, where it's going to end up, which jurisdictions are going to be using it". Much the same as the market for construction disputes itself.

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SPOTLIGHT ON: **BRAD STRAHORN** PARTNER, DISPUTE RESOLUTION, SYDNEY

Brad Strahorn is a construction and infrastructure disputes specialist, based in our Sydney office. He advises on all aspects of the resolution of project disputes. Here he gives us an insight into his career as a construction lawyer, his time in our Tokyo office and the trends his team is currently seeing in the Australian market.

What sparked your interest in a career in law?

I had an interest in law from an early age, but on reflection, I'm not sure why. There are no other lawyers in my family and I had little exposure to the profession in my years growing up.

Despite that, I was curious enough to take legal studies as an elective subject in my years of senior school. My teacher was the nephew of the former Australian High Court Justice Frank Kitto, and while his interest in history meant that he rejected the idea of a career as a lawyer for himself, he was passionate about the law and his enthusiasm was contagious. I ended up taking the subject prize at the end of senior school and my interest grew from there.

I suppose I was attracted to the analytical nature of the work and the heavy focus on problem solving. I was also attracted to the way that law has the ability to impact every aspect of commercial life. The context in which we play our role as lawyers – and I say that as a construction and infrastructure disputes lawyer – is diverse, always challenging and deeply interesting.

How did you end up as a construction and infrastructure disputes lawyer?

My first rotation as a trainee was as a property lawyer. At that time trainee rotations lasted for a year and, to be honest, it was the longest year of my life. If nothing else, though, I learned that I did not want to be a transactional lawyer.

My next rotation was in the Disputes practice, and 15 years later, I am still here. While I initially acted on a wide range of commercial disputes, over time my focus shifted to construction and infrastructure disputes.

As a result, when the opportunity arose to join the Brisbane office of legacy Freehills in the construction disputes team in 2008, I took it.

It was a busy time to be in construction disputes in Queensland with a mining boom in full swing, and a number of enormous infrastructure projects that were at that time in delivery.

> "There is currently in excess of A$40 billion of infrastructure projects at various stages of procurement in Sydney, and as a result of that, our clients are very active on projects in this region"

You have moved around in your career, what have been the drivers for those moves?

As the merger between legacy Herbert Smith and legacy Freehills was completing, I was invited to do a secondment in the construction and infrastructure disputes group of the Tokyo office. I jumped at the opportunity. The firm has an incredibly strong disputes practice in Tokyo. As a result, the office is commonly asked to advise on large disputes of strategic significance to Japanese clients. My expectations were well and truly met and I found the experience incredibly rewarding.

Following my return to Australia the next year, I was asked to move to Sydney to further grow the construction and infrastructure disputes practice. It was an easy decision to make. There is currently in excess of A$40 billion of infrastructure projects at various stages of procurement in Sydney, and as a result of that, our clients are very active on projects in this region.

In terms of drivers, I have tried to make the most of opportunities that present themselves to me, and I've been very fortunate to have been presented with some good ones over the course of my career.

What trends are you seeing in the construction & infrastructure market at the moment in Australia?

There are a few trends that are beginning to surface and to play out in interesting ways.

The first is the volume of foreign contractors participating in the local market on projects, not only in partnership with local contractors, but in partnership with each other. While this presents the usual challenges that any foreign market player would face in engaging in procurement in a relatively unfamiliar jurisdiction, the challenges are acute without the assistance of a local operator, made all the more complex by the fact that Australia's federal structure means that foreign contractors cannot adopt a one size fits all strategy to projects around the country.

A particular issue that we commonly see concerns the operation of security of payment processes, and the wide application of these processes to construction work in each jurisdiction of Australia. In general terms, the sub-contract market is sophisticated and well heeled in their ability to administer subcontracts in an aggressive way, and players know how to take advantage of security of payment processes.

In addition to this, the influx of foreign contractors has obviously added to the competitive pressures in the market, and by extension, the risks that contractors (generally) are prepared to take on in bidding for projects. Once again, that places pressure on the need to administer contracts in an efficient way and to innovate in design development and in project delivery.

The second trend I see concerns the challenges involved in responding to the shift in projects from mining infrastructure towards what are now predominantly transport projects. There is a skill shortage in key areas which has obvious implications for project delivery assumptions made in the course of project bids. It is also a different proposition to deliver projects for a government owner/key stakeholder (as is the case with many transport projects), rather than a private owner procuring mining infrastructure. There's certainly a consistent overlap, but the issues are not the same. Transport projects typically involve much greater public scrutiny, a broader stakeholder constituency that needs to be consulted in project delivery, and a complex political context. There is an adjustment involved in understanding the implications of these issues for project delivery.

"... that places pressure on the need to administer contracts in an efficient way and to innovate in design development and in project delivery"

To me, these types of issues – particularly when considered against the scale of modern infrastructure projects, and the fact that the pressures of project delivery leave little margin for error – serve to emphasise that an understanding of context, and current trends, is critical to the success of what we do in terms of advising our client. We never forget that.

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EMERGENCY ARBITRATORS AND EXPEDITED TRIBUNALS IN CONSTRUCTION DISPUTES – SOME RECENT EXPERIENCE

Can an emergency arbitration deliver on the promises of speed and efficiency? In this article, **Ann Levin and James Doe** of the London office and **Robin Wood** of the Madrid office describe recent experience of an emergency arbitration under the ICC Emergency Arbitration Rules relating to a substantial construction project in the MENA region. They also discuss the applicable test for relief in emergency arbitrations, and the differences between the ICC and LCIA approach to emergency arbitrations.

Arbitration is a popular form of dispute resolution in construction, particularly for international projects. In the right circumstances, arbitration can offer significant advantages over litigation, with parties able to choose (or participate in the choosing of) a Tribunal composed of people with particular skills or experience, and awards that are kept confidential.

However, a commonly cited disadvantage is that there may not be time to constitute a Tribunal where urgent relief is required, such as an injunction to prevent the dissipation of assets. Traditionally, in such circumstances, the parties have had to turn to the national courts for assistance.

Under English law a residual jurisdiction has been preserved at section 44(3) of the Arbitration Act 1996 (the **Arbitration Act**) to allow the courts to grant emergency relief:

"If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."

Other jurisdictions with sophisticated arbitration laws have similar provisions. It is, however, clearly less than ideal for parties who have deliberately and thoughtfully chosen to resolve their disputes through arbitration to be required to turn to the courts when they are in need of urgent relief, and not every country offers the laws and court systems to make emergency applications possible.

This article sets out HSF London's recent experience of an emergency arbitration in a construction dispute.

Emergency Arbitration regarding a construction dispute

HSF London recently participated in an emergency arbitration under the ICC Emergency Arbitration Rules relating to a substantial construction project in the MENA region. Such an experience still remains relatively rare, even amongst seasoned arbitration practitioners. We found the process to be an effective way of dealing with certain urgent matters, although there are clearly limits to its application.

The construction contract was subject to the laws of England and Wales. The Claimant sought emergency relief related to the imposition of liquidated damages for delay.

The process was quick and efficient. The Claimant issued its Application for Emergency Measures to the ICC, which confirmed within one working day (3 calendar days given the intervening weekend) that the emergency arbitration procedure applied. The Respondent was notified of the proceedings at the same time (although a copy of Application was not received for another 2 working days), and the Emergency Arbitrator was appointed within 48 hours.

Despite a request for an extension of time for the Respondent's reply because its key witness was on vacation, the Emergency Arbitrator took a robust approach, requiring that the original timetable be maintained. This required the Respondent's reply to be submitted within 7 days of being notified of the proceedings and only 5 days from receipt of the Application documentation. A one day hearing took place within 8 days of the Emergency Arbitrator's appointment and only 13 days after the Application.

The parties were not required to prepare written skeleton arguments or opening briefs and the hearing itself consisted of oral submissions by both Claimant and Respondent's counsel. Although witness statements had been submitted by both parties, it was agreed that there would not be any cross-examination of the witnesses.

The Emergency Arbitrator's order was handed down 7 days after the hearing, a total of 20 days after the Claimant's Application and within the time limit set out in the ICC Rules.

Such timescales are fast even by comparison to UK statutory adjudication (28 or 42 days under the Construction Act 1996) and DAB proceedings (84 days under the FIDIC forms), and are comparable with urgent interim injunction proceedings in the English High Court.

Test for relief in Emergency Arbitrations

1. the Emergency Arbitrator must have prima facie jurisdiction, (that is, there must seem to be jurisdiction at first sight);
2. the Applicant must have a prima facie case on the merits;
3. there must be a threat of irreparable harm; and
4. the case must be so urgent that it cannot await the composition of the Tribunal.

The process ran smoothly and the Emergency Arbitrator produced a concise and well-reasoned emergency order, including a decision on the allocation of the costs of the emergency proceedings. The Emergency Arbitration appears (on this occasion at least) to have been effective in resolving the dispute, at least temporarily.

Test for relief in Emergency Arbitrations

Although the Claimant argued that the Emergency Arbitrator had a broad discretion to award interim relief and was not constrained by either the law of the seat or the substantive law of the contract, the Emergency Arbitrator determined that the basic test to be applied was that espoused by Ali Yeşilirmak in his book Provisional Measures in International Commercial Arbitration, namely that:

1. the Emergency Arbitrator must have prima facie jurisdiction (that is, there must seem to be jurisdiction at first sight);
2. the Applicant must have a prima facie case on the merits;
3. there must be a threat of irreparable harm; and
4. the case must be so urgent that it cannot await the composition of the Tribunal.

The issues of jurisdiction and a prima facie case on the merits were not disputed, and so the Emergency Arbitrator concentrated on the questions of irreparable harm and urgency.

Regarding the test to determine whether irreparable harm would be caused to the Claimant, the Emergency Arbitrator was persuaded by Ali Yeşilirmak's observation that, when considering interim measures, aimed at the preservation or modification of the status quo "an Arbitral Tribunal should carefully consider contractual and statutory rights of contracting parties; for instance, what risk allocation is envisaged or what rights a party has under the applicable law. Further, an applicant should not be permitted to rely on arguments that are or should have been known by it at the time of entering into arbitration agreement." On the facts presented, nothing had happened which was inconsistent with the risk allocation agreed between the parties.

Considering potential causes of irreparable harm, the Emergency Arbitrator endorsed the definition of dissipation of assets propounded by Gary Born in International Commercial Arbitration (Kluwer Law International, 2014 (2nd edition)) that "a party has begun to, or appears likely to engage in, conduct that goes beyond the ordinary course of business, by attempting to dissipate assets, encumber assets, or grant preferential security to insiders." Again, on the facts, no such circumstances existed.

The Emergency Arbitrator also considered whether a more stringent test applied for an application for security for payment of an award, citing with approval Ali Yeşilirmak's comment that:

"A security for payment or claim is a kind of advance payment designed to guarantee the payment and/or enforcement of the final award where the applicant proves to be right on the merits of the case in dispute. The power to grant such security generally arises from the broad interpretation of either power given to the Tribunal in regard of interim protection of rights or the arbitration agreement. For the grant of security for payment, the [Applicant] needs to demonstrate that it is highly likely that the award, if it were rendered in its favour, would not be enforced."

The Emergency Arbitrator concluded that, on the facts of this case, the Claimant needed to show that it was "highly unlikely" that the Respondent would pay the ultimate award, thereby causing irreparable harm to the Claimant. That was a high bar. The Emergency Arbitrator concluded that it had not been met and rejected the application for emergency relief.

Comparing the ICC & the LCIA approach

Rules allowing emergency arbitration are relatively new and, while somewhat different approaches have been taken by different arbitral institutions, there is nevertheless a great deal of common ground, as is evident from a brief comparison of the emergency arbitration procedures under the 2012 edition of the ICC Rules of Arbitration (the **ICC Rules**) and the LCIA Arbitration Rules (2014) (the **LCIA Rules**).

Under both sets of Rules, the applicant makes its application to the relevant institution, but must copy or notify the proposed respondent, thereby precluding applications without notice. If such relief is required, for example applications for a freezing injunction, the parties will still need to look to the courts.

The relevant arbitral institution assesses the merits of the application and, if granted, appoints an Emergency Arbitrator. Under the ICC Rules the Emergency Arbitrator's order is due 15 days after the file is transmitted to him (Appendix V, Articles 2(1), 5(1) and 6(4) ICC Rules). Timescales are similar under the LCIA Rules with the order due within 14 days of his appointment (Article 9B (9.8) LCIA Rules).

Emergency Arbitrators under both sets of Rules have substantially the same powers as an Arbitral Tribunal, albeit their decision will not bind the full Arbitral Tribunal. One significant difference is that, while the ICC requires the Emergency Arbitrator to fix and apportion costs, under the LCIA Rules these costs will form part of the arbitration costs - in effect "costs in the case" (Article 9B (9.10) LCIA Rules).

A point to consider is that both sets of Rules anticipate that full arbitration proceedings will be commenced. While this does not preclude the parties from settling or simply deciding to let the Emergency Arbitrator's order stand, a full arbitration (with all of its implications in terms of costs and inconvenience) is likely to follow an emergency arbitration.

Expedited Tribunal

As an alternative to emergency arbitration, the LCIA Rules allow a party, in cases of "exceptional urgency", to request that the formation of the Arbitral Tribunal be expedited (Article 9A (9.1) LCIA Rules). If such an application is granted, the LCIA Court can "abridge any period of time under the Arbitration Agreement or other agreement of the parties" (Article 9A (9.3) LCIA Rules).

An expedited Tribunal may not be able to act as quickly as the Emergency Arbitrator but, if the matter can wait, this route may reduce overall costs and has the advantage of a properly constituted Tribunal.

An incomplete solution?

Although the emergency arbitration and expedited Tribunal provisions have gone a long way towards addressing the issue of emergency relief in arbitration, there are still some matters (such as without notice applications) which can only be resolved by the courts, and parties may not have a choice between court and emergency arbitration.

In England, it was recently held in Gerald Metals SA v Timis [2016] EWHC 2327 (Ch) that the English court could not grant a freezing injunction because the LCIA Rules provided for an Emergency Arbitrator who could grant similar relief. This was based on section 44(5) of the Arbitration Act which provides (by exception to section 44(3)) that:

> "In any case the court shall act only if or to the extent that the Arbitral Tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively"

The court held that section 44(5) of the Arbitration Act effectively makes emergency arbitration an exclusive remedy, and the courts only retain jurisdiction where equivalent relief could not be sought from an expedited Tribunal or Emergency Arbitrator.

Conclusions

Emergency arbitration can provide an effective and rapid option for parties who require urgent relief. In particular it can offer an effective alternative to court injunction proceedings. However, in England certain types of relief (most notably applications without notice) must still be sought at court, which remains an important option for parties, even where they have agreed to resolve their disputes through arbitration. Before emergency arbitration is sought, it must be borne in mind that the test applied for entry is likely to be strict and the applicant must also be well aware of the limitations on the relief that can be availed.

This is a shortened version of an article which first appeared in Construction Law in March 2017.

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SPOTLIGHT ON: **MIKE MCCLURE** PARTNER, DISPUTE RESOLUTION, SEOUL

Mike McClure heads the dispute resolution department in our Seoul office and has a focus on construction and infrastructure cases. In his journey to becoming a partner in South Korea, Mike has also worked in the firm's offices in London, Dubai, Hong Kong and Moscow. He talks us through his experience across the global practice, his interest in advocacy and the current growth in the Asia market.

During your time with the firm, you have worked with the London, Hong Kong, Moscow and Dubai offices, and you have now moved to Seoul. How has working across these offices shaped your growth as a lawyer?

I have always enjoyed living and working in new countries and engaging with new cultures. To be given the opportunity to do this as part of my job has been fantastic. It is one of the things that attracted me to working in an international firm in the first place. My family has had a life that's very different from some of our friends, but it's something that we enjoy.

Working in different jurisdictions has its own challenges and rewards. Something that always varies across cultures is what the clients expect of their lawyers and how they expect lawyers to interact with them. It has been challenging to work with all varieties of clients, and yet to find a way to gain their trust, to get the right kind of information from them and to learn to produce advice that they can understand and that is useful for them. It has been a challenge I have enjoyed!

> "Something that always varies across cultures is what the clients expect of their lawyers and how they expect lawyers to interact with them"

I think my time in different cities has made me more adaptable, having quickly learned that disputes are not run in other parts of the world as they are in London. From my time in Russia and parts of Asia, I have seen that one does not always find the level of documentation that you might usually expect when running a dispute in the UK. In these jurisdictions, far more is done orally, sometimes over a handshake. You might not see a well-negotiated, beautifully drafted contract or extensive minutes of meetings. Yet, similar legal principles apply, so how you establish your case can ultimately prove to be not so very different. This has its own pros and cons, but as a mid-level lawyer in Russia, I never found myself stuck on a tedious disclosure exercise!

You are keenly interested in advocacy. As a junior lawyer, how did you seek to get as much advocacy experience as possible?

My interest in advocacy goes back to my time in university. I very much enjoyed debating and mooting, and the thrill of making compelling arguments has carried on from there. At HSF, I have been fortunate that the firm has a great culture of training its lawyers to be advocates. When I was a trainee in the Hong Kong office, we were encouraged to make applications before masters in courts. As a junior associate in the London office, I was encouraged to take up higher rights of audience to be allowed to argue in the courts in England and Wales.

In the HSF international arbitration team, on most matters it is the HSF team that does the advocacy. This is led by a partner but there are always opportunities for a junior member of the team to get hands on experience, by doing some of the advocacy at a procedural hearing, examining or re-examining witnesses, doing small parts of opening and closing submissions and eventually doing some cross examination.

> "No matter how good you are and how well you can think on your feet, if you don't know the facts of the case, you can come unstuck very quickly"

I have attended hearings since the time I was a junior lawyer. Even though I didn't have a chance to argue, I helped the partners prepare their briefs, and I was always entrenched in the preparation of the case. I had the opportunity to work with partners who went on to become QCs, such as Paula Hodges QC. When you brief QCs outside of the firm, you miss out on the great experience you have when you are working side by side with them, in the same firm and in the same team. You are so much more involved.

My time doing advocacy in HSF has made me acutely conscious of the importance of certain

things. One, preparation is key. I have sometimes seen barristers instructed on matters who are not into the detail of the case, and at least initially, they struggle. No matter how good you are and how well you can think on your feet, if you don't know the facts of the case, you can come unstuck very quickly. Two, you must always play your hand. If you have bad points, you must deal with them. You can't hope that they will go away. They usually sit and fester and more often than not, they infect your good points. If you don't address them, it is unlikely that you will win.

As an outsider just starting his practice in Seoul, what are your initial thoughts and impressions on the legal market?

Asia is such an exciting part of the world to be in. The growth in Asia now exceeds what we see in Europe and the USA. It is great to be a part of that dynamic and growing market. With the merger, Asia has become central to our business. I can see the depth and strength of our Asia and international practice first hand in Seoul. The matters we work on almost always involve our other offices, be it on transactions or on arbitrations. In the nine months I have spent in Seoul so far, the matters I have worked on have required me to work with colleagues in the Singapore, Hong Kong, Shanghai, Tokyo, Brisbane, Perth, Frankfurt, London, Dubai, Saudi Arabia and New York offices!

In Seoul, our mandate is to try and win outbound work for Korean clients. We have a great team on the ground with fluent Korean language skills. We have also started a programme of putting Korean nationals through the London training program, to give them good international exposure and training before they come back to join us. We've just had our first trainee become an associate in the London office.

"I can see the depth and strength of our Asia and international practice first hand in Seoul"

My aspiration for my time in Seoul is to build on the excellent disputes practice we have here, and work on further interesting mandates. The idea is to build a team of lawyers with international disputes experience, in particular arbitration, and Korean language capabilities. Seoul is a very competitive market with lots of established international firms, with more looking to enter, and a very good level of domestic firms. We compete for the same kind of work, and to get instructions we need to show value. For me, the idea is to help Korean clients in Seoul and across the world grow and improve their businesses.

A key part of my focus is on construction and infrastructure disputes work. This has a natural synergy with the very many Korean EPC contractors in Seoul. I hope to build on the already strong relationships we have with a number of them. Our plan for growth is organic and we hope that as we become more established in the market, and continue to bring value to our clients through the firm's broader international network, that the Seoul office will grow naturally.

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SPOTLIGHT ON: **SIMON CARIDIA** CORPORATE INFRASTRUCTURE PARTNER, LONDON

While he could have ended up as a professional pianist, Simon chose to study law at university and is now a partner in the corporate energy and infrastructure team in the London office. In this interview, Simon shares his transition from being a projects lawyer to advising on the financing of key infrastructure projects, his focus on growth in the markets in Western and Eastern Europe and his views on the interface between the transactional and disputes construction practice.

Can you tell us a little about your background and how you came to become a lawyer?

My first exposure to studying law was at school. My English teacher had previously been a practising solicitor and he offered an after-school class for about six of us to study law as a GCSE option. It was the first time I appreciated the law in a wider context than the criminal trials we all saw on the news. It was also the first time that I identified with study as a means to a potential career choice rather than as a means to pure academic success.

Nevertheless, my principal academic interests were in maths and sciences. These were the focus of my A-level studies alongside a keen passion for playing the piano. It was the latter that came close to derailing my future career as a lawyer. I almost accepted a place at the Royal College of Music but I decided instead to fall back on the interest sparked a few years earlier and went to study law at university. I am often asked if I ever regret that decision and the truth is that I don't. I still have a passion for music but having the piano as a relaxing and enjoyable diversion from a career in the law always seemed eminently more sensible than attempting to do it the other way around.

You have a broad practice covering project development, finance and M&A. How did that come about and how does it influence your perspective as a practitioner?

I would like to think that the breadth of my practice is the result of carefully planned, strategic decision making on my part. But the reality is that, as is often the case, most of it was down to luck and opportunity.

I originally qualified as a projects lawyer focusing on the commercial documentation for UK PFI projects, principally concession agreements, construction contracts and operation & maintenance contracts. I focused

Photograph by: Eugina Liberty Photography

almost exclusively in this area for two years before moving away from a specific UK PFI focus into PPP projects in Western and Eastern Europe and, to a lesser extent, the Middle East. In 2008/2009, I found myself initially supporting, then leading, a team advising the lenders on financing the expansion of the M25 motorway in the UK just at the time of the global financial crisis. Whilst my role was initially focused on the commercial project documentation, the necessity to completely restructure both the commercial and financing documentation for the deal following the collapse of Lehman Brothers meant that I suddenly found myself with the leading credential in the project finance market and a list of client banks which, at that time, represented pretty much every active funder in the market.

"In Western Europe, there has been a lot of activity in the Netherlands which looks set to continue for the next few years at least"

The next few years saw huge innovation in the market and my practice increasingly focused on project financing and also the emergence of infrastructure as an asset class in M&A transactions. With new infrastructure funds popping up almost every week, investors looked for asset specialists and turned, perhaps inevitably, to those practitioners that had historically structured and financed the development of these assets.

So, I now find myself with a practice that encompasses project development, project finance and infrastructure M&A. With this breadth of experience, I am able to offer a truly holistic view of an infrastructure transaction regardless of the particular role that I am engaged for. I believe my clients appreciate this and it is a breadth of expertise that I try hard to sustain.

My own background hopefully explains why I am a vocal proponent of broadening the experience and expertise of our associates. Their chance of building a successful career is significantly increased if they have broad experiences and a wide skill set that allows them to adapt to the demands of the market from time to time.

What is your sector or geographic focus now, and how do you see these markets developing in the short and medium term?

Geographically, I continue to look at opportunities in the UK and across Europe. In the past few years, the market for greenfield project development in the infrastructure sector has been limited save for a small number of mega-projects which we, as a firm, have been involved with such as the Hinkley Point C, Thames Tideway and HS2. There are signs of growth in the number of projects coming to market and we will look for opportunities on those transactions. In Western Europe, there has been a lot of activity in the Netherlands which looks set to continue for the next few years. In Eastern Europe, there remain sporadic opportunities such as the D4/R7 highway in Slovakia which we acted on last year. Finally, there are new markets emerging such as Norway where we are acting on PPP pathfinder projects in advance of a purported €100bn investment in Norwegian infrastructure over the next 10 years.

In the infrastructure M&A sector, appetite remains high from investors although high pricing of assets is deterring many funds from participating in auction processes. Regulated utilities and airports will continue to come to market across Europe and the last year or so has seen the recycling of assets originally sold in the immediate aftermath of the global financial crisis as a result of government sell-offs or refocusing of corporates on their core markets.

"Our goal is to provide valued advice to our clients across their business with deeply embedded relationships that permeate through everything that they do"

How important is the interface between the transactional work that you do and the construction and infrastructure disputes practice?

It is vitally important.

Firstly, we are operating in the same markets and we share many actual and prospective clients. Those clients, particularly the industrial clients, are often not structured in a way that makes a distinction between up front project development and ongoing asset management. This means that whether we are working on a primary project development or on an operational dispute, we often share the same contacts within the client organisation.

Secondly, whilst operating in the same sector, we are not competing with each other and there are therefore significant opportunities to consolidate relationships and undertake work with clients at different points in the infrastructure value chain, e.g. the ability to pick up work on a dispute through our involvement in the original transaction.

Thirdly, the pre-eminence of our construction disputes practice and the "lessons learned" experience that they can bring is a significant value-add to the front end transactional team. We so often draft contracts in a bubble, often dreaming up hypothetical scenarios which we carefully draft around whilst sometimes missing those risks that an experienced disputes practitioner would immediately identify.

Our goal is to provide valued advice to our clients across their business with deeply embedded relationships that permeate through everything that they do. In this context, collaboration between front end transaction teams and disputes practitioners must be a good thing and is only set to increase.

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