TRANSPORT AND INFRASTRUCTURE POST-BREXIT - RISKS AND OPPORTUNITIES

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Legal Briefings

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.”

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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.

“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”.

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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.

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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.

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

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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.”

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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.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

JAMES DOE
PARTNER AND JOINT GLOBAL HEAD OF CONSTRUCTION DISPUTES, LONDON
+44 20 7466 2583
James.Doe@hsf.com

DAVID NITEK
PARTNER, LONDON
+44 20 7466 2453
david.nitek@hsf.com

TIM HEALEY
PARTNER, LONDON
+44 20 7466 2356
Tim.Healey@hsf.com

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