DGA

PART OF TSA MANAGEMENT

DGA EBRIEF
FEBRUARY 2024

CONTENTS

MESSAGE FROM THE MANAGING DIRECTOR

JIM BOURKE

This is our first EBrief publication of 2024. These regular quarterly publications bring commentary on developments within the construction industry and expert articles relating to the core quantum /commercial and delay analysis services provided to our clients across the DGA offices, supported by a guest legal viewpoint on each occasion.

The timing of this edition coincides with the opening of our latest international office in Dublin, DGA Ireland, where Mark Kehoe and Michael Lewis will be facilitating the full range of DGA services, now including those of our sister business, Henry Riley, as part of the wider TSA Management group offering. Further details can be found at the end of this publication.

Mark returns home to Dublin after working with DGA's Brisbane based team in Australia. At the same time, Michael is well established in the Dublin market, having owned and run the locally based business Schofield Lothian Ireland for the last 35 years and having collaborated with DGA a number of times during this period. Our Dublin team will be providing a local industry related article for our subsequent Ebrief publication.

Turning to this publication and its contents, our guest article on this occasion comes from Joe Mills, Solicitor at Ward Hadaway LLP, who looks at what constitutes a Pay Less Notice (PLN) in England & Wales under The Housing Grants, Construction and Regeneration Act 1996, and how it is frequently the subject matter of disputes arising out of payment cycles in construction disputes. Staying with adjudication but moving to the other side of the world, Lorine Liu (Senior Consultant DGA, Australia) follows up on her contribution to the last EBrief with her look at adjudication outcomes in Victoria and the potential impact of legislative change.

Brendan Robinson (Director, DGA UK) examines the pitfalls of not ensuring there is an Accepted Programme when working under the NEC form of Contract and how to protect against this occurring. Also, in the UK, Mark Lucas (Director, DGA UK) looks at what constitutes Practical Completion under the JCT suite of contraction contracts, considering how this is affected by defects (trivial, significant or latent) and employer occupation (beneficial or not).

Lastly, we end with a mainland European flavour provided by Christina Pavli (Senior Consultant, DGA UK) and Angelos Markou (Senior Consultant, DGA UK) from our delay team, who provide a focus on contracts and dispute resolution in Greece. In particular the key differences between

Greek contract law and English contract law, the Greek court system and dispute resolution methods encountered in Greece.

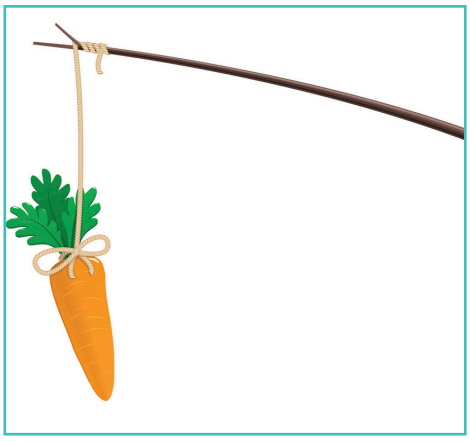
As always, the details of the training services DGA offers across our various international offices are at the back of this publication. With the Lunar New Year imminent, I will take this opportunity to wish you all a happy Chinese New Year.

Enjoy your read!

NEC 4 AND THE UNACCEPTED PROGRAMME

BRENDAN ROBINSON
DIRECTOR, DGA UK

Everyone who has ever been on a NEC course will no doubt have been told that the Accepted Programme sits at the heart of the NEC form of Contract. The purpose of this is to encourage good project management, by not only ensuring that all parties to the project know what they have to do and when, but its intention is to assist the change control process.



From experience, though, we have all probably been on projects where there is either no accepted programme or the programme is not accepted for a number of months. The NEC uses the carrot and stick approach when encouraging the production and updating of the programme to gain acceptance on a monthly basis – the stick is most definitely aimed at the Contractor.

Most people know about NEC4 ECC Clause 50.5, which states that if there is no programme identified in the Contract Data, one quarter of the Price for Work Done to Date is retained in assessments of the amount due until the Contractor has submitted a first programme (showing the information which the contract requires) to the Project Manager for acceptance.

However, Clauses 64.1 and 64.2 are not so well known and also impact the Contractor and provide strong incentives to keep the accepted programme up to date. For if there is not an Accepted Programme in place, the Contractor loses control of the compensation event process.

Clause 64.1 states *"The Project Manager assess a compensation event …*

- *If, when the Contractor submits a quotation for the Compensation Event, it has not submitted a programme or alterations to a programme which the contract requires it to submit, or*
- *if, when the Contractor submits a quotation for the compensation event, the Project Manager has not accepted the Contractors latest programme for one of the reasons stated in the Contract".*

Clause 64.2 states *"The Project Manager assesses the programme for the remaining work and uses it in the assessment of a compensation event if…*

- *There is no Accepted Programme,*
- *The Contractor has not submitted a programme or alterations to a programme for acceptance as required by the contract, or*
- *the Project Manager has not accepted the Contractor's latest programme for one of the reasons stated in the Contract".*

Clauses 64.1 and 64.2 gives the Project Manager full control of both the quantum and time effect of any compensation event if there is no accepted programme, the Project Manager makes his own assessment of the Target Adjustment and uses his own programme to assess the impact of the compensation event on the Key Dates and Completion Date.

The Project Manager needs to notify the Contractor of his assessment and give him details of it within the period allowed for the Contractors submission of his quotation for the same event (Clause 64.3). Only if the Project Manager fails to assess a compensation event within the time allowed, the Contractor may notify the Project Manager of that failure. If the failure of the Project Manager continues for a further two weeks after the Contractors notification, then the Contractors initial quotation is treated as accepted (clause 64.4).

Important elements to note here is that in order to protect themselves, a Contractor should always ensure they have an accepted programme in place. If it does have a programme rejected, it should quickly take measures to get a programme accepted. I know this is sometimes easier said than done.

To achieve this, I would recommend:

- **A pre submission meeting in which all Parties review the programme prior to submission, the Contractor talks to the Project Manager through the submission, and they can discuss any areas of concern and gain agreement to ensure acceptance.**

- **I would also recommend that any narrative which accompanies the programme submission identifies the key elements such as change from the last submission, details of the critical path and any movement of Key Dates or the Completion Date, with an explanation as to why.**

This will hopefully reduce the grounds for non-acceptance of the programme and serve as a record of the Contractor's and the Project Manager's conduct and position.

REVIEW OF ADJUDICATION OUTCOMES IN VICTORIA AND POTENTIAL IMPACT OF LEGISLATIVE CHANGE?

LORINE LIU

SENIOR CONSULTANT, DGA AUSTRALIA

INTRODUCTION

This is a follow-up article on the topic of adjudication in Australia (the first DGA e-brief article here: Review of adjudication outcomes across Australian States (NSW, VIC, and QLD): are the regimes effective?

In this article, we delve into the history of adjudication outcomes in Victoria and explore the potential impact of recently proposed legislative changes.

The underpinnings of Victoria's legislation, which provides for adjudication of construction industry disputes, the *Building and Construction Industry Security of Payment Act (Vic) 2002 ("**SOPA**")*[i], unchanged since 2006, look set to be overhauled in the near future. A parliamentary inquiry delivered its report in November 2023, which made significant recommendations regarding how payment practices could be improved in Victoria.

HISTORIC ADJUDICATION DATA TRENDS

As a recap, authorities in the NSW, VIC, and QLD above publish adjudication activity statistics[ii] that provide insights into the functioning of adjudication regimes in each state.

While there are many insights into the workings of adjudication regimes across the States, the variability and the trends over time, the overall picture is clear from the ratio of the amount determined through adjudication compared to the claimed amount in adjudication applications (what could be termed the **"Success Ratio"**).

i In Victoria the *Building and Construction Industry Security of Payment Act (Vic) 2002 ("SOPA")* applies to any construction contracts entered after 30 March 2007. SOPA aims to ensure that any person who carries out construction work or supplies related goods and services under a construction contract will be paid; and further, that if disputes arise over payment, a claimant may rely on a relatively quick and inexpensive adjudication process to recover payments due.

ii Data from Building and Construction Industry (Security of Payment) Act Adjudication Activity Annual Report for VIC, NSW, and QLD. See e.g. Adjudication activity statistics published by Victorian Building Authority (https://www.vba.vic.gov.au/building/security-of-payment/adjudication-activity-statistics)

Analysis over the period 2018 to 2023 showed that in NSW and QLD, the Success Ratios[iii] are 12% and 18%, respectively. By contrast, the Success Ratio for VIC is notably higher at 35%. In practical terms, this means that a claimant in an adjudication process in VIC could expect to recover approximately 35 cents in the dollar on average.

The adjudication statistics published by the Victorian Building Authority provides insights into adjudication activity over time. Charts A and B below summarise how the application and determination numbers and amounts claimed changed over the period 2005 to 2023:

- The number of adjudication applications has seen a general increase over the years with periodic fluctuations. Determinations lag the applications as one would expect, given that not all applications proceed to a determination based on a negotiated settlement or otherwise.

- There is a notable change around the commencement of the COVID-19 pandemic in 2020 – a steep decrease and subsequent recovery.

- Success Ratio of Determinations to Applications: There has been a decrease in the Ratio over the years, suggesting that although more claims are being lodged, a smaller proportion is recovered in adjudication determinations on average.

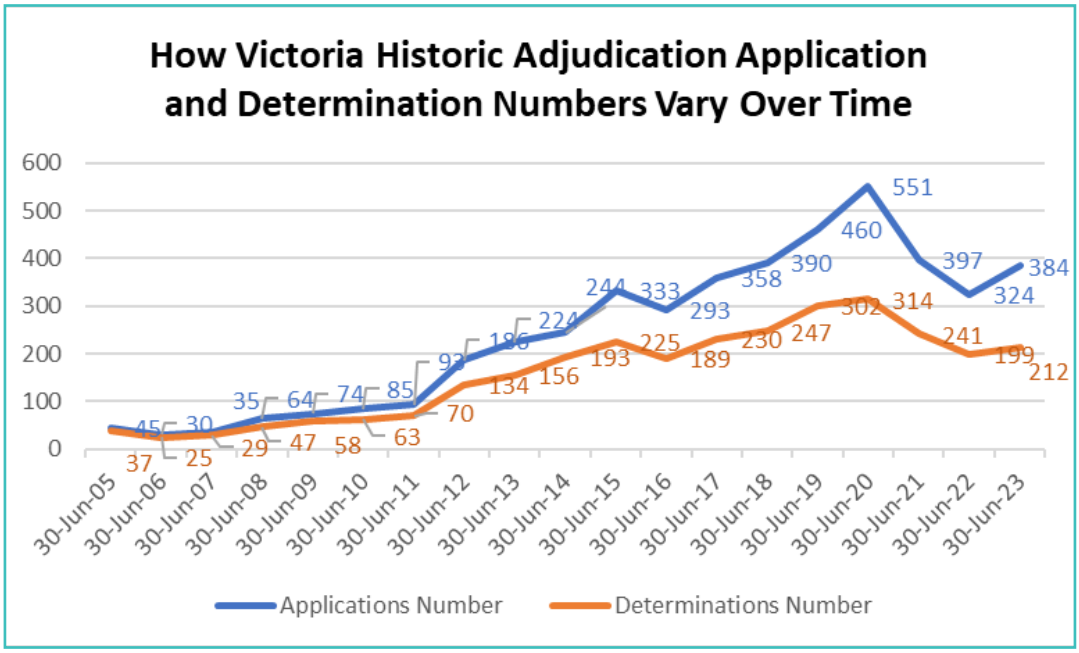


Chart A: Victoria Adjudication Applications and Determinations Comparison from 2005 to 2023

iii Details explained in the first article. Calculated from the available statistics, the ratio of the amount determined through adjudication compared to the claimed amount (termed the "Success Ratio").

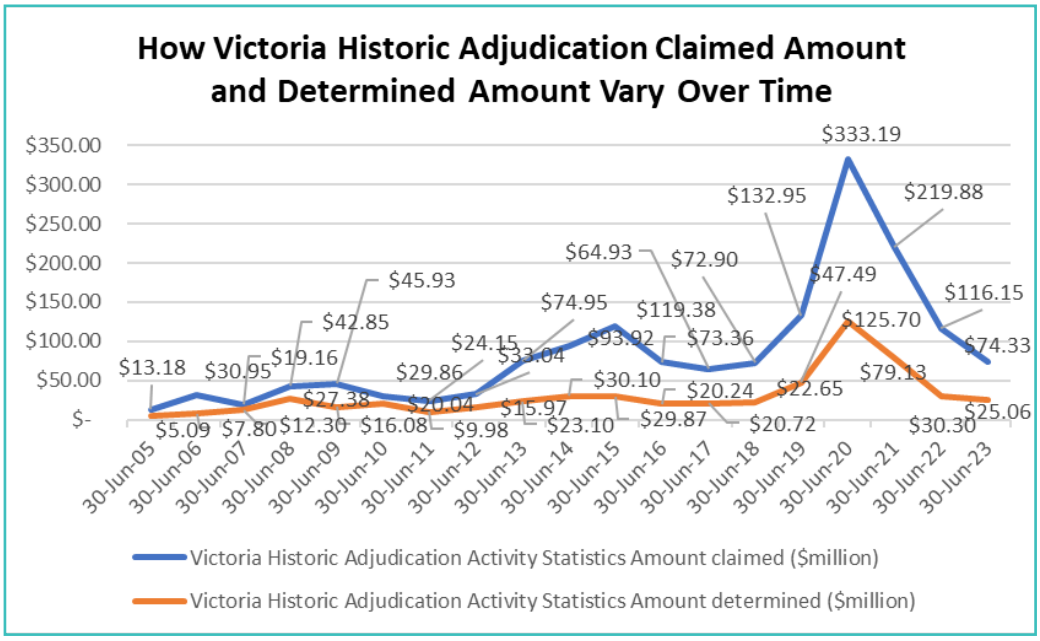


Chart B: Victoria Adjudication Applications and Determination Amounts Comparison from 2005 to 2023

Analysis of the adjudication statistics for NSW indicates that more applications and larger claim amounts by claimants did not lead to a meaningful improvement in the award by adjudicators. It is interesting to see the same trend in VIC.

Within the data published each year in VIC it is possible to calculate the Success Ratios across bands of claim amounts (adjudication applications claiming less than $5,000, $1,000,000 to $4,999,999, etc.).

Range of amounts ($)	Financial Year 2018 to 2023		Financial Year 2018 to 2023		Total Success Ratio
	Total Claimed Amount	Total Adjudicated Amount	Average Claimed Amount	Average Adjudicated Amount	
<5,000	$ 670,154.00	$ 306,472.00	$ 111,692.33	$ 51,078.67	46%
5,000-9,999	$ 1,584,340.00	$ 780,424.00	$ 264,056.67	$ 130,070.67	49%
10,000-24,999	$ 7,937,954.00	$ 3,673,074.00	$ 1,322,992.33	$ 612,179.00	46%
25,000-39,999	$ 8,587,428.00	$ 3,865,395.00	$ 1,431,238.00	$ 644,232.50	45%
40,000-99,999	$ 29,605,080.00	$ 15,029,740.00	$ 4,934,180.00	$ 2,504,956.67	51%
100,000-249,999	$ 62,317,504.00	$ 27,928,976.00	$ 10,386,250.67	$ 4,654,829.33	45%
250,000-499,999	$ 72,027,936.00	$ 31,211,092.00	$ 12,004,656.00	$ 5,201,848.67	43%
500,000-749,999	$ 43,060,056.00	$ 12,606,235.00	$ 7,176,676.00	$ 2,101,039.17	29%
750,000-999,999	$ 37,457,999.00	$ 12,845,591.00	$ 6,242,999.83	$ 2,140,931.83	34%
1,000,000-4,999,999	$ 229,256,743.00	$ 48,763,369.00	$ 38,209,457.17	$ 8,127,228.17	21%
5,000,000-9,999,999	$ 66,297,442.00	$ 21,447,162.00	$ 11,049,573.67	$ 3,574,527.00	32%
>10,000,000	$ 390,604,803.00	$ 151,965,536.00	$ 65,100,800.50	$ 25,327,589.33	39%
Total	$ 949,407,439.00	$ 330,423,066.00			

Table 1: Total sum of claimed amounts versus total sum of adjudicated amounts by claim range for 2018-23 financial year[iv]

iv The total claimed and adjudicated amount were computed using the data available on the Victorian Building Authority website, comprising the "Claimed amount" and the "adjudicated amount" recorded for each financial year spanning from 2018 to 2023. The total success ratio was determined through the total adjudicated amount compared to the total claimed amount in the table.

Success Ratios generally decrease as claim values increase. This may suggest that even where a claimant may have access to better advice, and financial capabilities, the recoveries in adjudication determinations do not improve markedly. There is no clear linear trend comparing amounts claimed and adjudication determination amounts as shown in Chart C.

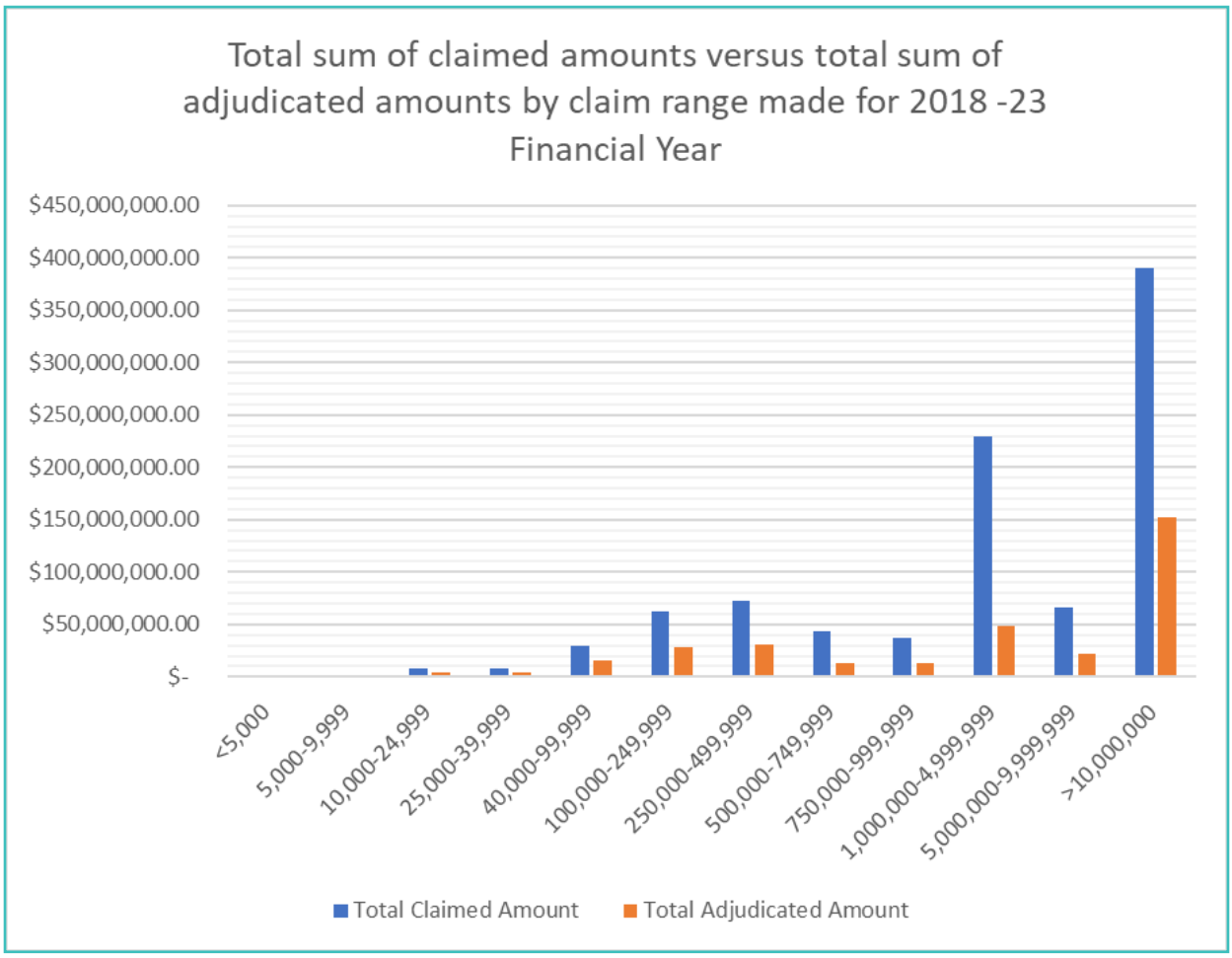


Chart C: Total sum of claimed amounts versus total sum of adjudicated amounts by claim range made for 2018 -23 Financial Year

IMPACT OF PROPOSED LEGISLATIVE CHANGES

In November 2023, the Victorian Government's Environment and Planning Standing Committee has made significant recommendations to amend SOPA and adjudication procedures following its inquiry into payment issues for subcontractors.[v]

v Parliament of Victoria, Legislative Assembly Environment and Planning Committee, Employers and contractors who refuse to pay their subcontractors for completed works, Inquiry Report November 2023. Link: https://new.parliament.vic.gov.au/4addf8/contentassets/9ab3bdb01ce64ba3a0a5d6532f9e0bfa/laepc-60-01-nonpayment-of-subcontractors.pdf

Among the Inquiry's 28 recommendations are the following important proposals:

1. Abolition of the "excluded amounts" regime which is unique to Victoria (Recommendations 2 and 19)

As a recap to the first DGA e-brief article: Review of adjudication outcomes across Australian States (NSW, VIC, and QLD): are the regimes effective?, part of the explanation for the higher Success Ratio in VIC would be the nuances of the SOPA regime. It is distinct from the other States, as SOPA does not permit claims for "excluded amounts". This is an exclusion of numerous potential claims which are commonplace in construction: claims for disputed variations, damages for breach of contract, delay and disruption costs, latent conditions, or a principal's claims for liquidated damages.

The abolishment of the 'excluded amounts' and 'non-claimable contract variations' provisions may invite an increase in applications in both number and quantum claimed, as one barrier to adjudication as a forum to resolve these disputed claims is removed.

DGA anticipates that the potential increase in claimed amounts would necessitate a wider role for expert advisors in technical, delay and quantum disciplines to evidence claims for delay, disruption and other claims currently prohibited under the "excluded amounts" regime.

The financial impact on claimants and subcontractors should be an improvement in cash flow (and certainty of recovery of costs) as progress payments could reflect all works rather than be subject to certain exclusions under the current SOPA regime.

2. Stop clock for festive period from 22 December to 10 January (Recommendation 4)

Everyone associated with adjudication processes in VIC would breathe a sigh of relief. This commonsense proposal would bring VIC more in line with equivalent legislation in other States.

This recommendation offers a practical solution to accommodate the industry's holiday slowdown. It provides a temporary halt to adjudication timelines, allowing parties involved to navigate the festive period without the stress of immovable deadlines imposed by legislation.

3. Adjudicators can declare void notice-based time bars and other unfair terms (Recommendations 5 and 6)

This signifies a significant step towards promoting fairness in construction industry payment entitlements and adjudication.

Modelled on provisions in Western Australia, this recommendation would empower adjudicators to rectify instances of unfairness arising from strict or onerous time-bar clauses governing payment entitlements.

DGA envisions that the implementation of Recommendations 5 and 6 could lead to increased focus on adjudicators and their exercise of broad powers to amend contractual terms, particularly among claimants and subcontractors. By granting adjudicators the authority to nullify unfair terms, the construction industry may witness a more equitable resolution of disputes.

4. SOP Act extended to residential building contracts, subject to consultation (Recommendation 10)

This recommendation aims to broaden the scope of SOPA to encompass residential construction contracts.

DGA would expect to see an increase in lower-value adjudication as a result and a focus on the cost-effectiveness of adjudication for claimants. Recommendation 10 could positively impact payment practices within the residential construction sector, offering a more structured and regulated framework for resolving payment disputes.

ANTICIPATED TRENDS POST-LEGISLATIVE CHANGES

Based on recent events and the state of the construction industry in VIC, DGA would expect to see many Recommendations from the Inquiry enacted into adjudication legislation. Historically, adjudication processes are supportive of claimants in VIC, with a higher Success Ratio compared to other States. It will be interesting to watch trends in the Success Ratios going forward, particularly for outcomes on higher value claims of more than A$1m.

The proposed legislative reforms in VIC may increase the need for expert advisors to substantiate claims for delay, disruption, and other aspects currently restricted under the existing “excluded amounts” regime. The gap between the amounts claimed and determined might narrow.

Overall, the proposed legislative reforms and potential outcomes signify a shift towards a more efficient, consistent, and claimant-friendly adjudication landscape.

CONTRACTS & DISPUTE RESOLUTION IN MEDITERRANEAN COUNTRIES: THE CASE OF GREECE

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INTRODUCTION

Coming from a mediterranean country with a different judicial system from the ones in the UK, we are frequently asked about how contracts and dispute resolution are approached in Greece. Are there any standard forms of contract used? What are the most common dispute resolution mechanisms?

In the first part of this article, the Greek contract law and key differences with the English law are explored, while the second part focuses on the Greek court system as well as on the dispute resolution methods encountered in Greece.

GREEK CONTRACT LAW

Greece (officially the "Hellenic Republic") is a civil code jurisdiction which is based on the Roman and German legal systems. Contrary to the common law jurisdictions, case law is not treated as a source of law. The Greek Code of Civil Procedure ("GCCP") provides the rules that govern civil procedures.

As for contract law, the Greek Civil Code ("GCC") serves as its primary source. Greek contract law has also been influenced by EU directives, given that Greece is a member of the European Union thus is also governed by the EU law.

The GCC provides both the general rules governing every contract and special rules that stipulate deviations or additions to the general rules, as applicable to specific contract types. The GCC governs both private and public contracts, although in a supplementary manner for the latter as they are primarily regulated by specific legislation for public works. Moreover, the award of public contracts is subject to specific procurement procedures, primarily deriving from EU legislation.

GCC and Construction Contracts

Construction contracts are regulated by Articles 681 to 702 of the GCC, being referred to as "contracts for works". However, unlike in the UK, there are no standard forms of construction contracts in Greece; not even the procurement routes are standardised. On the other hand, the "freedom of contract principle" (Article 361 of the GCC) enables parties to freely negotiate contractual terms, subject to mandatory law provisions as well as to civil law general principles. Consequently, contracts can be formulated to include either the design or the construction portion of a project, or even involve design and build, management contracting or construction management arrangements.

That said, Greek construction firms often opt to either use an international standard form of contract or develop bespoke contracts using a standard form one as a basis and adjusting it to take Greek law into account. For instance, FIDIC is commonly used in both cases for large-scale projects or for projects involving foreign organisations.

GCC and English Law

A key difference between GCC and English law with respect to contracts is how penalties are treated under civil law compared to common law jurisdictions. While their notion is considered as penal in the UK and hence they are not enforceable in courts, Greek law does provide for penalties (instead of liquidated damages) as a type of compensation in case of breach of contract.

Penalties, however, are subject to the stipulations of the GCC and must not act against fundamental principles , while the amount of a penalty must be reasonable and not excessive. Otherwise, a monetary penalty clause can be reduced to the "due/proper measure" or even annulled by a judge or arbitrator, if found to be disproportionate or excessive.

Another noteworthy difference is the applicable statute of limitations on contract claims. Under UK's Limitation Act 1980, claims for breach of contract and tort can be brought within six years for a simple contract and within twelve years for a contract executed as a Deed. In certain cases, the ordinary six-year statutory limitation period can be extended if the provisions of the Latent Damage Act 1986 apply.

Conversely, in Greece, the GCC lists in detail all categories of claims statute-barred within five years, while the contractual liability limitation period for all other claims is 20 years. Commercial claims, professional fee disputes and torts fall under the five-year limitation period. It should be also noted that as statutory limitation periods are subject to the provisions of the GCC, they cannot be contractually modified or overall excluded.

THE GREEK COURT SYSTEM

The Greek judicial system is comprised of two jurisdictions, the administrative one and the civil/penal one. Since there are no specialist civil courts in relation to construction disputes in Greece, courts allocate the case to the chamber that is competent to hear it.

The GCCP provides the rules for the allocation of the cases to the different court levels. In all civil matters where the dispute is monetary, the allocation is based on the amount sought. Non-monetary cases are also allocated according to the provisions of the GCCP. If there is no relevant provision, they then fall under the Three-member Court of First Instance.

The structure of civil courts is as follows:

- the Courts of First Instance (lower courts), which are divided into:

i) the Magistrates' Courts, for cases up to €20,000

ii) the Single-member Court of First Instance, for cases between €20,001- €250,000

iii) the Three-member Court of First Instance, for cases above €250,001

- the Courts of Appeal (higher courts), where a defeated party can challenge the legal and factual grounds of decisions of the Courts of First Instance by filing an appeal

- the Supreme Court (the highest court), a court of cassation with the power to review the judgements of the Courts of Appeal or questions of law

Civil Proceedings

Construction disputes in Greece are most commonly resolved through litigation. As described above, litigation is presided by a judge in the appropriate Court of First Instance (in accordance with the nature and the value of the dispute) and the decision is binding for both parties. Further to litigation, alternative dispute resolution ("ADR") methods, such as arbitration and mediation, are applicable.

The main stages in litigation are outlined below:

- filing a claim to the Court of First Instance with the full particulars and the factual background;
- service of the action to the defendant through a court officer;
- filing of each party's pleadings and documentary evidence;
- hearing of the case;
- issuance and publication of the judgment (Court of First Instance);
- filing of an appeal by the defeated party and issuance of the judgement (Court of Appeal); and
- filing of an appeal of cassation before the Supreme Court.

The Role of Expert Witnesses

The GCCP states that expert witnesses can be either appointed by the parties or by the Court to produce expert reports and give expert evidence. In the former event, the experts act as "technical advisors" to their clients and are guided by their guidelines as to what is to be examined, while also being bound by the rules of their field of expertise (such as the professional body they might be members of). In the latter event, the experts are guided by the instructions given by the Court.

The Court hearing the case assesses expert opinions, regardless if an expert was appointed by the parties or by the Court. Experts' conclusions may either be adopted and relied upon by the Court, or rejected should the Court consider that any instructions and/or clarifications given to the experts have not been followed. Moreover, the Court may request a new expert report, or its repetition or completion, either by the same or by different experts, if necessary.

ALTERNATIVE DISPUTE RESOLUTION IN GREECE

Arbitration

Arbitration has been gaining more and more popularity, mainly due to the delays associated with awarding justice through litigation. Apart from employment disputes and applications for interim measures, all other private disputes may be resolved via arbitration, under the provision for arbitration expressly included within the contract or that neither party objects to it. Moreover, similar to litigation, an arbitral ruling leads to a decision binding for both parties.

While Greek law provides that arbitral rulings cannot be appealed but only annulled under certain circumstances, parties may by mutual agreement file for an appeal. Furthermore, Greece is also a signatory party of the New York Convention, therefore foreign arbitral awards are also enforceable under Greek law, unless there are specific grounds for refusal.

The arbitration legal system in Greece distinguishes between domestic (which is governed by the GCCP) and international arbitration legislation (which is governed by the Greek Law on International Arbitration). Although the Greek Law on International Arbitration sets out the criteria as to whether the dispute falls under domestic or international arbitration, it also allows the parties to freely select the type of arbitration at its outset. In the case of international arbitration, parties can agree on and select the rules (such as the CIARB Rules or the ICC International Court of Arbitration Rules) as well as the arbitral venue, the language and the applicable governing law.

Mediation

In terms of mediation, the GCCP provides the following alternatives:

- extrajudicial mediation, which may be launched at any stage of the court proceedings;
- judicial mediation, which can also be initiated at any stage prior to or during the court proceedings; and
- judicial settlement (i.e., conciliation), which can be sought before a case is filed.

The latest legislation on extrajudicial mediation provides that lawyers must advise their clients prior to the commencement of the proceedings of the option to resolve the dispute through mediation, along with their obligation to attend a joint mediation session. Should the parties fail to reach an agreement during that session, they are entitled to refer the case to court.

With respect to judicial mediation, a neutral, certified Mediator Judge also participates in the mediation procedure, assisting the negotiations and proposing solutions. The Court of First Instance and the Appeal Court can invite at their discretion the parties to resort to judicial mediation and to postpone the hearing at the same time.

Finally, in the case of conciliation, a neutral third party such as the competent Magistrate, intervenes and attempts to resolve the dispute or achieve a settlement by recommending their own solution.

Other forms

It should be noted that, under the Greek legal system, there is no statutory right to refer a dispute to adjudication. However, subject to the provisions of the contract and the mandatory law, the parties are free to agree on adjudication or even expert determination, although this is not that common.

SUMMARY

The Greek and the UK judicial systems are inherently different, with Greece being a civil code country and the UK a common law and statute state . Greek contract law derives from the GCC and is characterised by the "freedom of contract principle". There are no Greek standard forms of construction contracts, hence bespoke contracts are predominantly used. However, the use of international standard forms (or their incorporation into bespoke contracts) is common for large-scale projects.

As for the Greek court system, it is divided into lower, higher and cessation courts. Construction disputes are mainly resolved through litigation, however the process is known to be significantly lengthy, thus arbitration has been getting increasingly widespread. A dualistic arbitral system has been adopted, distinguishing between domestic and international arbitration. Mediation is also not uncommon, and the Greek law even provides for a mandatory session before a case is brought to court. Finally, there is no statutory adjudication process.

PRACTICAL COMPLETION – A TALE AS OLD AS TIME

MARK LUCAS

DIRECTOR, PROJECT RISK ADVISORY, DGA UK

As an experienced Contract Administrator and Expert Witness, the subject of practical completion is a somewhat regular process and occurrence for me although rarely are the circumstances the same. More recently I've found myself being called upon to provide an independent expert opinion on the specific date on which practical completion of a project could be said to have been achieved, due to a dispute between the parties on the extent to which liquidated damages may or may not apply, including administration of the process by the Employer's Agent.

Hudson on Building and Engineering Contracts[i] ("Hudson") considers it desirable to be clear on the meaning of completion as a time obligation, albeit recognising that there is little English authority on the subject:

> ***"Usually it will mean bona fide completion free of known or patent defects so as to enable the owner to enter into occupation. The words "practical" or "substantial" in the English standard forms probably do no more than indicate that trivial defects not affecting beneficial occupation will not prevent completion (the more so, of course, if the contract provides for maintenance or defects liability period)"***

Maintaining the principle of completion as a time obligation, Hudson further advocates that:

> ***"In the last resort, the degree of required completion needed to discharge the contractor's obligation to complete to time will be a matter of interpretation but can be expected to differ from other aspects of the contractor's obligation to complete."***

Here, Hudson draws distinction between (i) the contractor's obligations to "*complete to time*" and (ii) the contractor's obligation to "complete" period, which Hudson elsewhere describes as "*indispensably necessary*" and "*contingently necessary*" work which in the absence of express provision means work deemed to be included in the contractor's price under the

i Hudson Building & Civil Engineering contracts; 11th Edition

"inclusive price principle". In other words, whether the Contractor has completed all of the works deemed to be included within its contract price is not a matter of interpretation but a matter of fact. However, the time by which this obligation is met is a matter of interpretation.

ALL CLEAR SO FAR?

On a more practical level, the Royal Institution of Chartered Surveyors (RICS) provides its own guidance on "*Defining completion of construction works*"[ii] where in response to the proposition "*When is a construction and engineering project complete?*" it explains as follows:

> ***"Subject to any express provisions in the contract, construction and engineering projects are not complete until all of the services required by the contract have been provided to a standard consistent with the requirements of the contract. Such services may include the provision of manuals, demonstrations and training, which, unless the contract states otherwise, will be required to be provided before the works can be said to be complete. The criteria relating to whether or not the service or workmanship has been provided to the required standard will include; any relevant provisions of the contract; any relevant provision of the specification; the purpose for which the works are intended, and any statements made by the contractor prior to his or her appointment, such as specific skills or experience."***

In relation to the term "beneficial occupation", the RICS explains that although often used to describe the standard of completion required for the meaning "practical completion", under the JCT suite of contracts there is no legal basis that supports "beneficial occupation" as a reliable test for practical completion, on the basis that although the Client may be physically able to occupy the building for the purpose and use intended (this being the suggested meaning of "beneficial occupation") there is no obligation to do so if the works are not complete in the full sense of the word, unless of course provided otherwise in the contract. The test for practical completion advocated by RICS is a limited test of reasonableness based upon the *de minimis* principle suggesting that practical completion cannot be denied due to the existence of very minor defects.

Pausing for a moment to digest the authoritative principles of Hudson and the more practical approach advocated by RICS, we find that on the one hand, Hudson" advocates that the meaning of completion is a matter of interpretation taking into account the owner's ability to occupy the building notwithstanding the existence of "*trivial defects*" and the contractors obligations regarding "*necessary work*" under the "*inclusive price principle*". The RICS viewpoint makes clear that all services required under the contract must be complete with all

ii RICS; Defining completion of construction works; 1st edition Guidance Note

contractual requirements satisfied, and under JCT forms of contract "beneficial occupation" is considered an unreliable test of practical completion, the favoured approach being a test of reasonableness based on the *de minimis* principle.

There is obvious commonality in principles between the aforementioned authorities which is both helpful and reassuring. Both are agreed that there is an element of subjectivity, and the contractors complete contractual obligations must be satisfied, aside of "trivial (trifling) defects". As to the meaning of "*beneficial occupation*" as expressed by both "Hudson" and RICS I would draw the following conclusion.

In a contextual setting, Hudson explains that "t*rivial defects not affecting beneficial occupation will not prevent completion*". In other words, "trivial defects" that do not affect the Client from occupying the building for the purpose and use intended cannot prevent completion from occurring. RICS in their guidance under the JCT suite of contracts contest that "beneficial occupation" is a reliable test for practical completion on the grounds that there is a lack of legal basis to support this approach and, the Client has no obligation to occupy if the works are not complete. My interpretation of this is that RICS are rightly steering contract administrators away from the misconception that the ability of a client (employer) to occupy a building for the purpose and use intended signifies practical completion. There is also the important matter of the contractor fulfilling all of its other contractual requirements, a matter on which both Hudson and RICS are fully aligned.

Fortunately Lord Justice Coulson in his well-known and inimitable fashion has also now given the industry clearer guidance and meaning on practical completion courtesy of the 2019 Court of Appeal Decision in the case of *Mears Limited v Costplan Services (South East) Limited, Plymouth (Notte Street) Limited, J.R. Pickstock Limited* (2019):

- *Practical completion is easier to recognise than to define. There are no hard and fast rules.*
- *The practical approach to practical completion can be summarised as a state of affairs in which the works have been completed free from patent defects, other than ones to be ignored as 'trifling'.*
- *Whether or not a matter is trifling is a matter of fact and degree to be measured against the purpose of allowing the employer to take possession of the works and to use them as intended, albeit it is noted that possession in itself does not necessarily constitute practical completion.*
- *There is no difference between an outstanding item yet to be completed and a defective item that needs to be remedied*
- *The existence of latent defects cannot prevent practical completion.*

With the baseline principles surrounding practical completion seemingly aligned both in law

and through institutional guidance, how is this best addressed in a practical environment. As RICS points out, common scenarios and experiences are:

1. Employers seeking to impose liquidated damages where the building can legitimately be occupied but there remains a small amount of relatively insignificant work.

2. Contract Administrators exercising wider discretion in interpreting the meaning of practical completion.

3. The unique nature of construction and engineering projects in relation to the integration of separate processes, products, teams and individuals.

From my own experience as an Expert but certainly not as a practitioner, I have encountered first hand disputes arising from scenario's 1 and 2 described above.

On one particular occasion I was engaged on behalf of a Contractor to advise on a certificate of practical completion that had been issued, but then "set aside" with the suggestion it was "conditional". Coincidentally a matter of a few days after Practical Completion had been granted the Employer and prospective Tenant requested "changes" to an external drainage system on the basis it was not compliant with the Employers Requirements and, therefore, defective. Subsequent defects also arose in an extensive gabion wall which the Contractor acknowledged and corrected. A second "Practical Completion" was issued some 21 months after the first, by which time the Tenant had terminated the Agreement for Lease on the grounds that there was a failure to achieve Practical Completion in time, resulting in the Employer making a claim against the Contractor of circa £5 million.

There was much "smoke and mirrors" created by the Employers legal team including a position that the Employers Agent was not in a position to grant Practical Completion when it did due to the identification of "defective work" a few days after the certificate had been issued. Alternatively, the Employer also argued the principle that "defects" constituted a "breach of contract" giving rise to an entitlement to damages. The Contractor's Legal Counsel and I

were aligned that the provisions and mechanisms within the building contract had been duly followed and that for all purposes under the contract, Practical Completion shall be (and was) deemed to have taken place on the date stated in the statement.

The above is a clear example of a Contract Administrator bowing to pressure from the Client to manipulate the meaning of "practical completion" to preserve the Clients best interest which on this occasion was apparently to satisfy the requirements of the prospective Tenant in order to give effect to the Agreement for Lease. Although the Tenant ultimately terminated its agreement with the Employer, citing late completion of the works, it was also alleged that the prospective Tenant had its own other reasons for extracting itself from the agreement.

In similar vein, I also have experience of an Employer carrying out "snagging inspections" for over 12 months before finally granting practical completion. Although on first glance the prevalence of reported "snags" appeared high volume, on detailed review and examination, the majority recorded such concerns as "*pin hole in grout*"; "*make good mark holes and remove pencil marks*" ; "*tighten loose taps*" "*provide caulking to window boards*"; "*screw and grommet missing*". These are the more extreme descriptions given but again highlight how Contract Administers seek to widen the interpretation of "practical completion" for the benefit of the Client. On this occasion there was no incoming Tenant[s] on the horizon.

Putting aside legal context and interpretation for a moment, as this is ultimately a solution to practical completion rather than a function of it, initial consideration must be given to the prevailing terms and conditions of the contract.

The standard JCT Design & Build Contract (2016) addresses practical completion at clause 2.27 stating:

"When practical completion of the Works or a Section is achieved and the Contractor has complied sufficiently with clauses 2.37 and 3.16 in respect of the supply of documents and information, then:

1. ***in the case of the Works, the Employer shall forthwith issue a statement to that effect ('the Practical Completion Statement');***

2. ***in the case of a Section, he shall forthwith issue a statement of practical completion of that Section (a 'Section Completion Statement'); and***

practical completion of the Works or the Section shall be deemed for all the purposes of this Contract to have taken place on the date stated in that statement."

The accompanying JCT guidance notes for the 2016 Design and Build Contract offers the following for amplification:

"Practical Completion, Lateness and Liquidated Damages (clauses 2.27 to 2.29)

> ***The sub-section requires the Employer to issue a Practical Completion Statement or Section Completion Statement as soon as the Works or Section achieve practical completion and the Contractor has fulfilled his obligations both as to as-built drawings and health and safety file matters (clause 2.27)."***

In consideration of the contractual requirements under the JCT 2016 Design & Build contract for determination of practical completion, it can be seen that the Employer must be satisfied as follows;

1. Practical Completion of the Works or a section has been achieved.
2. The contractor has complied sufficiently with Clause 2.27 (as-built drawings) and;
3. The Contractor has complied sufficiently with Clause 3.16 (Health & Safety file matters)

In keeping with the holistic concept of practical completion the contract maintains a combination of subjectivity on the part of the Employer alongside compliance by the Contractor with tangible obligations.

On the matter of subjectivity, Keating on Construction Contracts] ("Keating") discusses the nature of "Employers Approval" as follows [iii];

> ***"Normally the employer's approval must not be unreasonably, or dishonestly, or***

iii Keating; 11th Edition; sub-section 5-003

> ***capriciously withheld. What is reasonable is a question of fact. The right to withhold approval may by the terms of the contract be limited to certain parts or qualities of the work. If approval is subject to the completion of certain tests which the employer through its own default fails to carry out, it cannot withhold its approval because the work has not satisfied other tests not agreed upon in the contract."***

From the Contractors perspective its requirements under clause 2.27 of the 2016 JCT Design and Build contract are what can be known as a "double obligation" which Keating further explains as below[iv];

> ***"A contractor must frequently complete work according to a specification or to a certain standard and to the satisfaction of the architect. It is a question of construction in each case whether this imposes a double obligation on the contractor. There is no rule of law or principle of construction applicable to construction contracts that, where the contract contains a term that a structure is to be erected in a prescribed manner and to the satisfaction of the employer's architect or engineer, the contractor fulfils that obligation if the architect or engineer is in fact satisfied even though the structure has not been erected in the prescribed manner. The general principles of construction apply, and the meaning of any clause must be ascertained from within the particular contract by construing the contract as a whole and giving effect so far as possible to every part of it. In that case, the engineer had issued an unqualified certificate of satisfaction, but the obligation to satisfy the engineer was held to be cumulative upon other obligations. The balance of English authority was said to favour a cumulative approach, but there was in fact held to be no particular applicable rule of law."***

So, how can we rationalise, understand and approach the process of practical completion to the extent that the actions of the Employer, or Agent on its behalf, can withstand third party scrutiny?

- Practical completion is a matter of interpretation based upon fact.
    - Have the works, other than patent "trifling defects" been completed in accordance with the contract? and;
    - Have all of the services required of the contractor under the contract been completed to the standard required under the contract?
- "Trifling defects" are a matter of fact and degree to be measured against the purpose of allowing the employer to take possession of the works and to use them as intended.

iv Keating; 11th Edition; sub-section 5-046

- The Employers approval cannot be unreasonably, dishonestly or capriciously withheld.
- The Employer cannot "prevent" the Contractor from achieving practical completion.
- Under JCT contracts the Employers ability to take "beneficial occupation" is legally unsupported as a reliable test for practical completion.

Rarely are unamended standard forms of building contract adopted. The nature and extent of bespoke amendments vary. As one of the main causes of construction dispute is the parties' ability to properly understand and administer the contract, taking the time to identify and/or avoid inappropriate risk from outset can prove invaluable. Mutual agreement on the precise meaning of "practical completion" should not be discounted; and is indeed advocated by RICS as a way of providing greater certainty in the agreement, increasing trust between the parties and reducing the likelihood of costly dispute resolution.

PAY-LESS NOTICES? PAY MORE NOTICE!

JOE MILLS

SOLICITOR, WARD HADAWAY LLP

INTRODUCTION

A dispute over value is as synonymous to the construction industry as bricks, mortar, and health and safety checks. As Lord Browne-Wilkinson put it, "*Building Contracts are pregnant with disputes*"[i]. Continuing with that theme, the payless notice ("**PLN**") is often the source from which many disputes are borne.

PLN's are the instrumental tool in challenging sums contained within a payment notice, or application for payment. It might be that there is an accounting error, or a sum erroneously carried over from a previous application - or, it might just be that there is a true dispute over the value, quality, or timing of the works. Whatever the circumstances, no payment cycle in a construction contract can realistically be challenged without one.

For ease within this article, the party claiming money (from whom a payment application would have originated) is referred to as the **Payee**. On the flip side, the party from whom money is claimed (and from whom a PLN would be required) is referred to as the **Payor**.

The PLN becomes the Payor's best friend in setting out its challenges to the Payee's request for payment and beginning the steps towards effective and efficient resolution, which could potentially spare the need for lengthy and costly litigation processes.

It will come as no surprise to those reading this piece that PLN's frequently arise in disputes arising out of payment cycles in construction contracts. It is the authors' hope that some clarity can be shed on what remains, in our day-to-day practice, one of the most common generators of disputes.

i ¶105E, Linder Gardens Trust Ltd v Lenesta Sludge Disposal Ltd [1994] 1 AC 85

WHAT CONSTITUTES A VALID PLN

Section 111(1) of The Housing Grants, Construction and Regeneration Act 1996 (the "**Act**") is clear that the Payor must make payment of the "*notified sum*" on or before the final date for payment.

The Act provides that the "*notified sum*" is the sum specified in the Payor's payment notice or, if no such notice was ever issued, the Payee's default payment notice. If the Payor wants to pay less than the "*notified sum*" it must serve a PLN.

At section 111(4) of the Act parliament made clear that a PLN issued pursuant to section 111(3) of the Act must comply with the following:

- The PLN must in fact be given (it sounds obvious, but all too often one is never served! [ii]).
- It must specify: (i) the sum the Payor considers due on the date the PLN is served; and (ii) **the basis on which that sum is calculated**.
- A PLN must be given no later than the prescribed period before the final date for payment.
- The PLN may not be given before the notice by reference to which the notified sum is determined.

The contract may define the "*prescribed period*" before the final date for payment, otherwise section 9 of Part II to The Scheme for Construction Contracts (England and Wales) Regulations 1998 (the "**Scheme**") marks that time period for serving the PLN to be "*not later than 7 days before the final date for payment*". This date represents the line in the sand; if no PLN is issued by this point the Payor is out of time and the "*notified sum*" falls to be paid in full.

When it comes to assessing compliance with the provisions of section 111(3)/(4) of the Act, all cases turn on their own facts. In each instance the tribunal, be that the Court or an Adjudicator, is tasked with undertaking an interpretation of the contractual notice in question.

HOW IS A CONTRACT NOTICE CONSTRUED IN THE FIRST PLACE: IS THE DOCUMENT I SENT A PLN?

Perhaps the most useful recent illustration of the Courts' approach to dealing with this question

ii Service of notices could generate another article in its own right. For current purposes, the authors' advocate going back to the contract itself to check how things should be sent. Don't just assume because it was ok once and went unchallenged (i.e. sending by email), that the same will apply in future.

is the summary provided by Mrs Justice Joanna Smith DBE in *Advance JV & Ors v Enisca Ltd*[iii]. At paragraph 47 the judge summarised the key authorities (our emphasis added in bold):

- *"In considering the true construction of a contractual notice…**the question is not how its recipient in fact understood it.** Instead "the construction of the notices must be approached objectively. **The issue is how a reasonable recipient would have understood the notices**"…"*
- *"The notice must be construed taking into account the "relevant objective contextual scene", i.e. the court must consider "what meanings the language read against the contextual scene will let in"…**This means that, amongst other things, the reasonable recipient will be credited with knowledge of the relevant contract …**"*
- *"The purpose of the notice will be relevant to its construction and validity…"*
- *"The court will be "unimpressed by nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis"…Instead, as Sir Peter Coulson says… focusing specifically on Pay Less Notices:*

  > *"The courts will take a commonsense, practical view of the contents of a payless notice and **will not adopt an unnecessarily restrictive interpretation of such a notice**…It is thought that, provided that the notice makes tolerably clear what is being held and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective."*

- ***"There is no principled reason for adopting a different approach to construction in respect of different kinds of payment notices**… as that would be contrary to the guidance..."*
- *"… any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form…**Payment notices and Pay Less Notices must clearly set out the sum which is due and/or to be deducted and the basis on which the sum is calculated**…"*
- *"Over and above the question of whether a notice has achieved the required degree of specificity, will be the additional question of whether the document…was in fact intended to be such and whether it is "free from ambiguity"... The sender's intention is a matter to be assessed objectively taking into account the context…"*
- *"…**there is no requirement for a particular type of notice, such as a Pay Less Notice, to have that title or to make specific reference to the contractual clause in order to be valid**…"*

iii Advance JV & Ors v Enisca Ltd [2022] EWHC 1152 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2022/1152.html

- ***"One way of testing the validity or otherwise of a Pay Less Notice will be to see whether it "provided an adequate agenda for an adjudication as to the true value of the Works…"***

What can be observed from the Court's summary in Advance JV is that there really is no 'one size fits all' answer to this question. This is, dependant on what side you are sitting on when a dispute involving a PLN arises, either a blessing or a curse. For illustration purposes, the following are all examples of factual circumstances where the document under examination has met the threshold of a valid PLN:

- An email appending an 'Interim Payment Notice', although wrongly labelled, met all the requirements of the contract so as to constitute a PLN[iv] .
- An email, with no documents attached, saying: *"Don't agree with your application. Phase 2 had to be redone due to your steel not to drawing. Our costs for breaking out and re-concrete phase 2 was in excess of £20k. Take the £20k from the £38k for phase 1 leaves £18,843 …."*[v]

The above authorities should still be treated cautiously. In *Systems Pipework Limited v Rotary Building Services Limited*[vi] Coulson J (as he then was) found that:

- The lack of reference to the relevant contract clause, coupled with the absence of the actual sum purportedly due, was terminal to the validity of the PLN.
- The fact the Payee might have been able to work out the sum due and the relevant clause was "not good enough"[vii]

The following are all also examples of where the Court has held the PLN was invalid:

- An email which was claimed to be a PLN was ultimately dismissed as it did not match the manner in which 'formal' PLN's had been issued previously and therefore intention could not be established[viii].
- Absent calculations explaining the grounds for withholding payment, the PLN was rendered invalid[ix].

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iv Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2017/17.html

v Jonjohnstone Construction Limited v Eagle Building Services Limited [2017] EWHC 2225 (TCC)

vi Systems Pipework Limited v Rotary Building Services Limited [2017] EWHC 3235 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2017/3235.html

vii Although this appears to conflict with the stance subsequently adopted by Court in Advance where the judge summarised the parties should be "credited with knowledge of the relevant contract"

viii Jawaby Property Investment Ltd v The Interiors Group Ltd & Anor [2016] EWHC 557 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2016/557.html

ix Muir Construction Ltd v Kapital Residential Ltd [2017] CSOH 132

WHAT IS REQUIRED TO SHOW TO BASIS THE SUM IS CALCULATED / MAKE THE PLN CLEAR AND UNAMBIGUOUS?

The Act is silent in respect of what information is required of the Payor in order to comply with section 111(4) as regards showing the "*basis of the sum calculated*".

As in most areas of law, a clear document which states its purpose, reasoning, and its intentions is desired. However, this is the real world and in practice perfectly curated documentation is not always forthcoming.

Perhaps the most frequently cited authority on this topic is the judgment of Coulson J (as he then was) in *Grove Developments Ltd v S&T (UK) Ltd*[x]. The following passages from that judgment [xi] will be well known to adjudicators and tribunals throughout the country:

- *"A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it.* ***The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.****"*
- *"…Each has to make plain that it is, respectively, a payment notice or a pay less notice. Each has to* ***clearly set out the sum which is said to be due and/or to be deducted, and the basis on which that sum is calculated.*** *Beyond that, the question of whether or not it is a valid notice in accordance with the contract is a matter of fact and degree."*
- *"…there can be no possible objection in principle to a notice r****eferring to a detailed calculation set out in another, clearly-identified document. That is how these things are commonly done…"***

Time is a precious commodity in the construction industry. It is not always possible in reality to prepare a perfectly orchestrated PLN in an Excel document or similar (although in the authors' views this remains preferable). What is clear is the requirement for PLN's to offer, as a minimum, a basis for which the sum is calculated. In our experience it is at this hurdle that most PLN's fall. Where the Courts have expressed a readiness to forgive failings in formalities on the form of a document, the requirement for a PLN to reflect in substance the calculations which give rise to the figure contained therein is inescapable.

x Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2018/123.html

xi as subsequently approved by the Court of Appeal in S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448.

To that end, the Payor issuing the PLN would do well to ask the following questions:

1. 'Have I given clear calculations for how the figure is arrived at?' - If the answer is no, then do them.

2. 'Are the calculations sufficient such that, with the benefit of the peripheral documents and other evidence, an independent Quantity Surveyor could assess the sum in question and arrive at a similar figure?' - If the answer is no, ensure this level of detail is provided.

OTHER COMMON PITFALLS

CAN A PAYMENT NOTICE ALSO SERVE AS A PLN?

The short answer here is no, it cannot. There is academic debate surrounding whether, following the decision of Akenhead J in *Henia Investments Inc v Beck Interiors Ltd*[xii] the path is paved for such an argument to be run successfully, but there is currently no direct authority on the point.

Previous iterations of the Act allowed the Payor to combine a payment notice and a withholding notice (provided the section 110 and section 111 of the Act (as it was then) were complied with). Those provisions are not repeated in the Act as is currently in force.

NEGATIVE VALUE PLNS

It is trite law that a PLN can certify a negative sum, i.e. a sum as falling due to the party issuing the PLN.

Instances exist of contractors making applications for payment and receiving a PLN in response, within time, certifying a negative sum. The question is then '*who is the paying party*'? In the premise, it is the *contractor* not the *employer* who becomes the Payor.

The result of this type of PLN is that the party issuing the notice is stipulating that the party who made the application for payment has been overpaid.

As a result, the negative sum as certified by the PLN becomes the "*notified sum*". This can have serious ramifications if the following payment application fails to extinguish the negative sum notified by the previous PLN.

xii Henia Investments Inc v Beck Interiors Ltd [2015] EWHC 2433 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2015/2433.html

PRACTICAL CONSIDERATIONS

OOPS – I FORGOT TO SERVE A PAY LESS NOTICE...

If a PLN is not served in time, but the payer wishes to still challenge the 'true value' of the sum, *Grove Developments Ltd* has transformed the landscape. Failing to provide a pay less notice in the prescribed period will not prevent the payer from challenging the sum in the future, however, in order to do so, full payment of the disputed amount must be made – its pay now, argue later.

IS IT STILL 'PAY NOW, ARGUE LATER', OR...

This concept was developed on once more in *Davenport Builders Ltd v Greer* [xiii] where the judge held that *Grove* remained authority for the proposition that the Payor must make payment in accordance with the contract, or section 111 of the Act as a pre-requisite to commencing a 'true value' adjudication. The industry has been keen to latch on to elements of that judgment where the Court suggested that a Payor would not always be restrained from launching a true value adjudication until such time that its immediate payment obligations (those requiring it to pay the "notified sum" following a failing to issue a valid PLN) had been discharged.

In *Davenport* the judge was cautious to make clear: *"It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so"*.

HAS ANYTHING CHANGED: DO I HAVE TO PAY BEFORE LAUNCHING A 'TRUE VALUE' CHALLENGE?

Since *Davenport* the Court has given further clarification via its decision in *Bexheat Ltd v Essex Services Group Ltd* [xiv] that: "unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a 'true value' adjudication under section 108." If anyone was left wanting for clarify, it appears to have been given by the then Judge in Charge of the TCC.

Consequently, caution should prevail in any situation where a Payor dares to venture against the tide and run a true value type challenge in circumstances where it has not discharged its immediate payment obligation.

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xiii Davenport Builders Ltd v Greer [2019] EWHC 318 (TCC) - https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/TCC/2019/318.html&query=(.2019.)+AND+(EWHC)+AND+(318)+AND+((TCC))

xiv Bexheat Ltd v Essex Services Group Ltd [2022] EWHC 936 (TCC) - https://www.bailii.org/ew/cases/EWHC/TCC/2022/936.html

WHAT CAN I DO TO DECREASE THE CHANCE OF A DISPUTE

In our view, the following should be included in any PLN to foster clarity between the parties:

1. **Label the document "Pay Less Notice" followed by the payment cycle it relates to. For example, saving the document as "Payment Notice_Application 12".**

2. **Do not just tag your PLN onto a lengthy email chain which may obscure its intention. Create a brief covering email, if necessary attaching previous email threads relevant, and use a clear subject line. For example "John Bloggs Employer Ltd: Payless Notice – Application 12".**

3. **Set out the reasons for paying less than the notified sum having regard, as a yardstick for measuring the clarity of those reasons, whether an independent quantity surveyor would be able to follow your reasoning and arrive at a similar determination.**

4. **Provide clear calculations showing how the notified sum is being reduced. Succinctly put, tell the Payee how the sum asserted as due is calculated. Ask yourself 'if an adjudicator ever had to construe this, would my calculations make sense'.**

5. **Confirm the sum which, by virtue of the PLN, will be paid to the Payee.**

6. **Avoid referring to other documents not attached or included. This only muddies the waters. If a document providing background, or a more detailed breakdown for the calculations in the PLN needs to be referred to, then confirm as much within the PLN itself as well as the email.**

CONCLUSION

PLN's remain, notwithstanding the swathe of authorities on the topic, a common and critical battleground in disputes relating to payment cycles in construction contracts. At the risk of stating the obvious, a PLN should still be issued promptly in reference to a specific payment notice or application for payment, with all deductions backed up in a manner that can be reasonably understood. Waiting for the prescribed period to expire should only be a last resort for a party (i.e. perhaps in the event that the deductions are too complicated to quantify sufficiently in the period permitted).

Paying an interim application in full whilst waiting to challenge the 'true value', particularly if

there are questions over the payee's liquidity, can lead to an uncomfortable and vulnerable situation for the Payee that would constitute a risk well worth avoiding.

Practical steps which take (in the grand scheme of things) a modest amount of time, go a long way towards mitigating the risks associated with this issue which remains a 'hot topic' in the industry.

There is no fixed rule which can be apportioned to all PLN's; the Courts have reiterated time and time again that the enquiry as to the validity of a PLN is a fact sensitive enquiry. If the Payor wants to find itself on the right side of that factually nuanced enquiry it would do well to have regard to the key questions the Court will ask itself when construing, through the lens of retrospect, what the parties contemporaneously intended. Clarity is key and will go a long way to avoiding a raft of issues.

Written by Joe Mills & Sam Slater

ward hadaway

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- NEC3 to NEC4 Engineering and Construction Contract – The changes and implications
- Term Service Contracts
- JCT Minor Works and Intermediate Building Contracts 2016
- JCT Intermediate and Standard Form Building Contracts 2016
- JCT Design and Build Contract 2016
- Contractual & Commercial Awareness

HALF DAY SEMINAR

- NEC3/ 4 ECC Compensation Events: the events, notification & assessment

BREAKFAST SEMINARS

DGA's next complimentary breakfast seminar is coming soon. Further details will be published on our website and via LinkedIn. If you would like to be added to our mailing list to receieve information directly please follow this link.

For more information about our training seminars, please email amy.telling@dga-group.com

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If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

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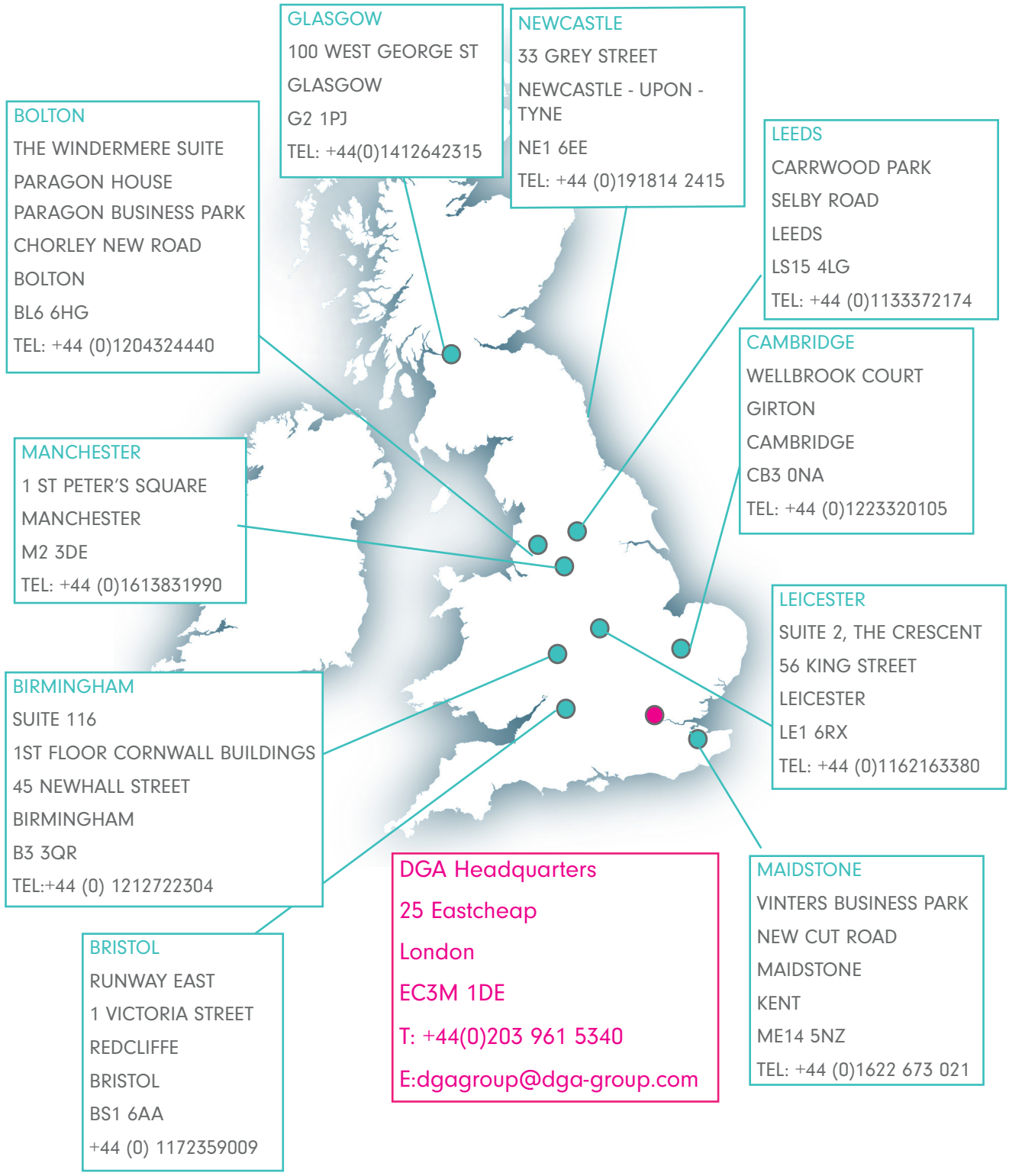

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