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MANAGING MULTIPARTY CONSTRUCTION DISPUTES

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EXPERT FORUM

MANAGING MULTIPARTY CONSTRUCTION DISPUTES

PANEL EXPERTS

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As a partner in Hogan Lovell's international arbitration team in London, **Tom Smith** advises clients on contentious issues arising out of their operations across the world. He has particular expertise in the resolution of disputes associated with complex engineering and infrastructure projects, and brings experience and knowledge of arbitration, mediation and court proceedings in the Commercial Court and the Technology and Construction Court.

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Jonathan Stone is a partner in Mayer Brown's construction and engineering practice. He advises parties, including developers, contractors, engineers, consultants, architects and suppliers, on all aspects of construction and engineering law. He has a broad experience of contentious litigation matters, both domestic and international, and acts on high value and multiparty disputes. A significant part of his work arises out of disputes on infrastructure and renewable energy projects, and he has extensive experience advising insurers and their professionals in the defence of professional indemnity claims.

CD: Could you provide an overview of key trends and developments driving construction disputes? What are some common causes of dispute within the construction industry?

Yamamoto: As restrictions related to the coronavirus (COVID-19) pandemic ease across the Asia-Pacific region, we have seen the resumption of construction projects, particularly across emerging markets in the region. In addition, the fastest growing economies in the region such as Vietnam and the Philippines have increased their commitments to infrastructure spending in 2022-23 as part of their economic recovery model. The increase in construction activity as a result of both the resumption of existing projects and the commencement of new projects is naturally likely to lead to a greater number of construction disputes. Furthermore, inflationary pressures induced by supply shortages of both labour and raw materials continue to persist, squeezing profit margins for project owners and contractors alike. Added to the delays caused by the pandemic and the various government regulations restricting activity, many parties have suffered costs that were not foreseen at the time of contracting and are turning to dispute resolution mechanisms in an attempt to recover losses.

Stone: In recent years, we have seen global events play a part in a large number of disputes. For example, in early to mid 2020, we saw a large volume of work looking at whether delays and costs as a result of the COVID-19 pandemic would trigger force majeure clauses. Coronavirus-related questions, and disputes, have waned but they have not gone away completely. We are now also seeing issues arising from the war in Ukraine. For example, some contractors are looking to pass on the increased costs of fuel and materials to employers on the basis that these increases are a result of sanctions on Russia. They say that these costs are payable under force majeure or change in law clauses. They are also claiming relief for delays. Claims made on this basis are often difficult, but that has not stopped contractors from trying. Claims relating to cladding systems remain a common cause of dispute in the UK, even five years after the Grenfell Tower tragedy. The ongoing Grenfell Inquiry provides another dimension to these disputes, as evidence about the working of the industry as a whole emerges on an almost daily basis. While cladding claims will not disappear anytime soon, the inquiry may provide clarity on how claims should be pursued, or what types of contractor or subcontractor are likely to be liable. What the industry really needs is a reported case or cases which address common issues. That will provide certainty, which will be welcomed by the participants in the disputes, as well as their insurers.

Smith: COVID-19 has had a significant impact on the construction industry globally – principally due to the effects of supply chain issues and the varying legislative responses to the pandemic with consequent impacts on the time and cost involved in carrying out construction work. In the early phases of the pandemic, we were seeing mandatory construction site shutdowns, reduced capacities on construction sites, and requirements for testing and tracing cases of COVID-19, which had a clear and direct effect on the planning, management and execution of construction and engineering projects. Initially both government and major employers were supportive of contractor claims, and willing to be flexible around contractual entitlements but, in recent months, we have been seeing employers taking a much stricter approach, leaving contractors facing significant losses with little chance of recovery. Accordingly, parties seeking to rely on force majeure clauses to obtain time and cost relief have seen varying levels of success.

CD: To what extent are you seeing a rise in multiparty cases? In your opinion, what forms of dispute resolution best suit disputes involving numerous parties?

Stone: The procurement methods used in the industry mean that, where a dispute arises, there can be multiple potential defendants for a claimant to choose from. This is exacerbated by the often overlapping obligations that those participants owe to their employer. For this reason, multiparty disputes are commonplace in the industry. Over the decades, several attempts have been made to limit the number of disputes in the industry, including multiparty disputes. These include attempts at making collaborative working a contractual obligation and ensuring that the insurance methods match. However, none of these attempts have been successful, and we do not expect the level of multiparty disputes to reduce any time soon. Court litigation is generally considered the best method of resolving multiparty disputes, because of the ease by which additional parties can be added to proceedings. This is one of the main advantages of litigation over arbitration, where it remains difficult to add third parties. Mediation, is, of course, another method of resolving multiparty disputes, but only usually when the defendants know that, unless they settle, they will be brought into formal and expensive proceedings.

Smith: There has been a notable increase in multiparty disputes in recent years as projects have increased in size and complexity. Litigation and arbitration can both be suitable as the final and binding method of resolving a multiparty dispute, providing the court or arbitral tribunal in question has adequate powers of joinder, consolidation and general case management. As for disputes during the course of a project, including multiple parties

in an interim dispute resolution procedure such as adjudication, or references to a dispute board, can sometimes be the most effective way of handling such issues. However, when parties are in the middle of delivering a project, the additional time and cost associated with including additional parties in the chosen interim dispute resolution procedure can often outweigh the benefits of doing so. These are of course all points to consider and take a view on when drafting dispute resolution provisions.

Yamamoto: Multiparty and multi-contract cases have long been part and parcel of resolving international disputes in the construction industry. Given the increasingly specialised and complex nature of large-scale construction projects involving not only employers, contractors and subcontractors but also stakeholders such as financial institutions and even public entities, it will not be a surprise to see a rise in multiparty construction cases in the coming years. Being consent-based, arbitration traditionally has been less well-equipped to handle multiparty and multi-contract disputes compared to litigation. That said, major arbitral institutions have developed significant experience dealing with multiparty cases, and institutional rules allowing for the joinder of parties to arbitral proceedings and for the consolidation of separate proceedings into one are highly conducive to the formal resolution of multiparty disputes. Where time is of the essence in resolving the dispute and the parties remain sensitive to cost, the non-binding option of mediation can be a good alternative to more formal arbitration proceedings. Mediation offers stakeholders the opportunity to retain control over the outcome, with the neutral mediator simply facilitating the creation of an acceptable resolution to the dispute.

CD: To be successful in resolving multiparty cases, what strategies should be deployed to manage certain complexities that may not be prevalent in two-party disputes?

Yamamoto: The involvement of multiple parties can add significant complexity to a case. It is, therefore, critical that parties approach the dispute resolution process with a highly methodical and strategic outlook. For 'allied' parties this might include, prior to commencement of proceedings, considering documenting the existence of common interest of joint privilege – in order to facilitate information sharing without unwittingly waiving privilege over key documents – and entering into costs sharing agreements, to apportion legal and associated costs. Where contractual chains are involved, parties should also be careful that they are not left 'carrying the can' by inconsistent decisions under different contracts. Typically, it will be a contractor who carries the risk of, for example, recovering in a subsequent arbitration from a

subcontractor damages which have been awarded in favour of an employer; joinder and consolidation provisions can provide a means of mitigating this risk.

Smith: A common challenge arising in multiparty construction disputes is where parties have agreed inconsistent forums for resolving disputes. Arbitration, for example, is a consensual process and parties cannot generally be compelled to join arbitral proceedings in the absence of prior agreement. Particular attention must be paid at the drafting stage to ensure there are mechanisms for joining all relevant parties to any disputes concerning common factual and legal issues. Prosecuting claims involving common issues in separate forums is highly undesirable due to the risk of inconsistent findings between decision makers and the consequent 'gap risk'. Moreover, duplication of proceedings will add to the already substantial costs typically involved in prosecuting multiparty construction disputes which, by their nature, tend to be lengthier and more costly than bilateral disputes.

Stone: The right strategy for resolving a case depends on the situation, and whether you are the claimant or a defendant. However, given the potentially high costs of multiparty claims, companies should certainly have mind to the right way to minimise their financial exposure. A claimant will typically state its case and, where there are multiple defendants, invite them to fight among themselves to allocate responsibility and loss. A claimant will try to minimise the number of defendants it is required to sue – the fewer the defendants, the cheaper the litigation – and leave the defendants to pursue any other parties necessary. As a defendant, a general point is that openly disagreeing with other defendants, unless you cannot avoid it, will often play into the claimant's hands. Defendants who act together will also find it easier to make well-pitched Part 36 or 'Calderbank' offers, which can put pressure on a claimant. Defendants also have the ability to 'gang up' on a single claimant, who can find itself outnumbered and outgunned in a hearing, or in negotiations.

"Given the potentially high costs of multiparty claims, companies should certainly have mind to the right way to minimise their financial exposure."

Jonathan Stone, Mayer Brown

Each defendant, though, will have its own position to protect, which can result in a certain amount of 'jostling', but that should be kept behind closed doors as much as possible.

FW: Have any recent, multiparty construction cases caught your attention? What lessons might the industry draw from the outcome of such cases?

Smith: The case that springs to mind here is the 2021 case of *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd (formerly known as Dunne Building and Civil Engineering Ltd) (in administration) and others*. In this case, Multiplex, the main contractor, claimed it had suffered loss arising out of a defective slipform rig. It brought claims against its concrete subcontractor, Dunne, and one of Dunne's specialist subcontractors. Because of difficulties enforcing the default judgments it obtained against these two defendants, Multiplex also brought a claim against a third defendant, a design consultancy with which it had no contractual relationship, with the judge holding that the design consultancy owed no tortious duty to Multiplex. The outcome of this was that Multiplex was left carrying its own losses outside of those strictly provided for in the contracts: a timely reminder that where parties on complex construction projects have agreed a chain of contractual liability in their project contracts, English courts will be slow to impose additional tortious liability on parties outside the contractual chain.

"Parties seeking to rely on force majeure clauses to obtain time and cost relief have seen varying levels of success."

Tom Smith,
Hogan Lovells International LLP

Stone: The recent case of *Building Design Partnership Ltd v. Standard Life Assurance Ltd* in the Court of Appeal was particularly noteworthy. The question at stake was whether a claimant could plead its case by way of sampling, rather than having to plead the detail of a vast number of variations – over 3500. In the context of multiparty construction claims, which are often document-heavy and expensive, the Court of Appeal agreed that this was a fair and proportionate way to submit the claim. The court noted that if the claimant had pleaded

every single variation, the necessary documentation would have filled over 60 lever arch files just for the pleadings. That was unattractive to the court, which was also mindful of the time it would take to try every single disputed variation.

CD: With the coronavirus (COVID-19) pandemic forcing more construction disputes to be conducted online, via videoconferencing platforms, what impact has this had on the resolution process? Do you expect technology to remain a feature?

Stone: In our experience, the reactions of the Technology and Construction Court (TCC) and arbitral tribunals to the challenges presented by the pandemic has been impressive in the circumstances. Because of this, conducting proceedings online has been much less disruptive than it could have been. Particularly in complicated multiparty cases which have international parties, there are clear benefits to retaining some hearings online. If hearings are short or procedural in nature, asking several parties with their legal teams to travel to attend court seems unnecessary when much the same can be achieved over Microsoft Teams. However, for more substantive hearings, for example where cross-examination is required, face-to-face interactions are important. Gauging a witness' response to evidence or questioning can be invaluable for a judge. Similarly, the possibilities and successes of mediation are limited by being conducted remotely. Establishing rapport and common ground is easier in person, and this is often conducive to establishing a more collaborative atmosphere.

Smith: The almost immediate – and, incredibly, fairly seamless – shift to virtual hearings as a result of COVID-19 lockdowns and work from home orders has caused a huge acceleration in the adoption of technology for the resolution of construction disputes, with parties participating in all forms of dispute resolution via online platforms – from negotiation and mediation to interlocutory and final hearings. However, conducting disputes virtually can present significant challenges for parties, both technologically and practically, and at least anecdotally due to the perceived effect the use of online technology can have on the soft skills required to successfully advocate or negotiate on behalf of clients. For that reason, I expect there will be a shift away from some of the online dispute resolution necessitated by the pandemic toward the traditional in-person model, at least in complex cases. However, its continued use for interlocutory hearings and smaller merits hearings is likely to lead to long-lasting benefits in terms of procedural and economic efficiency – which can only be a good thing for clients.

Yamamoto: In general, the expansion in use of online technologies to resolve disputes has been advantageous to parties. Where physical meetings and hearings are less frequent, parties enjoy the benefits of lower costs and greater availability of counsel and tribunal members, which can lead to an accelerated timeline for the resolution of the dispute. However, the use of online platforms is not without its challenges, particularly in document-heavy construction cases. Parties should agree early on with regard to provisions surrounding information security and confidentiality, and ensuring that all participants, including tribunal members, fact and expert witnesses and translators, are familiar with operating the technology. Basic problems such as bandwidth issues are more likely to present themselves in multiparty disputes where it is not unusual to have participants in multiple venues in virtual attendance. Using professional vendors for virtual hearings may be a cost well spent. Even as travel restrictions ease across the world, we expect technology to remain a feature in resolving construction disputes, particularly in the early procedural stages of the dispute resolution process such as case management conferences.

CD: What essential advice would you offer to parties on managing the challenges of multiparty construction disputes and giving themselves the best chance of reaching a favourable outcome?

Yamamoto: There are a number of steps parties may take from the pre-contractual stage onwards. Prior to contracting, if all parties wish to resolve their dispute in a single set of arbitral proceedings, they should consider entering into an umbrella arbitration agreement, or including across the contractual suite identical arbitration clauses that expressly provide for joinder and consolidation. Once a dispute has arisen, a party should consider whether its interests are served by having multiple claims relating to one project settled in a single arbitration; if so, it should consider the availability of joinder or consolidation or alternatively consider appointing the same tribunal in separate arbitrations, so as to avoid the risk of inconsistent decisions. Furthermore, parties dealing with multiparty scenarios should also consider the availability of direct claims – such as between employer and subcontractor – under applicable national law.

Smith: It is essential parties ensure at the drafting stage that appropriate mechanisms are in place to facilitate multiparty dispute resolution. It is often very difficult to obtain agreement from parties to those mechanisms once a dispute has crystallised, unless there are compelling relationship reasons for doing so. Parties should also consider the extent to which they are reliant on others – such as subcontractors – providing information in order to prosecute their own claims. While 'back-to-back' contracting arrangements are common in construction and

engineering projects, parties should carefully consider potential gap risks at the outset in order that strategies can be developed to manage those risks throughout the dispute resolution process. Parties engaged in multiparty disputes should remain cognisant of where their interests, and those of other parties, may or may not align, and ensure there are mechanisms in place for sharing information on a common interest privilege basis as appropriate.

Stone: Above all, parties need to be organised. With multiple parties comes multiple witnesses, experts, hearings and budgets. It is easy to lose track, whether you are acting for a defendant or a claimant. Therefore, having fewer parties is usually preferred. If that cannot be achieved, it is often helpful, as early as possible, to distil the issues and consider their merits and the evidence needed to resolve them. There can be, and usually are, many complexities with multiparty proceedings. Despite this, like all claims, they tend to be resolved based on a handful of key facts or issues. So, keep things as simple as possible and you will not go far wrong.

CD: Looking ahead, what are your predictions for multiparty construction disputes in the months and years ahead?

What factors are set to define activity in this area?

Smith: Current economic trends suggest that we are likely to see a rise in disputes of all forms, including multiparty ones, in the coming years. However, I will be interested to see whether parties continue to consent to arbitration proceedings being consolidated into multiparty proceedings in the same numbers. Perhaps parties' appetites for sprawling, multiparty disputes will reduce and there will be a trend toward simpler, quicker two-party disputes. This is particularly so when you consider the recent uptick in the use of dispute boards and other interim binding dispute resolution processes, which can give a 'good enough' resolution to many disputes while projects are still ongoing, unlocking disputes and removing the need for the traditional

> **"Many parties have suffered costs that were not foreseen at the time of contracting and are turning to dispute resolution mechanisms in an attempt to recover losses."**
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> *Megumi Yamamoto, Ashurst LLP*

kitchen sink final account style dispute resolution procedures which have been the traditional route to recovering losses on construction projects.

Stone: We see no sign of the number of multiparty disputes falling significantly in the months or years ahead. Arbitration is becoming increasingly popular, especially for international disputes, and we anticipate that the key arbitration institutions will attempt to modify their rules to make it easier to join additional parties to arbitral proceedings, albeit that may not be easy. More generally, we are anticipating an increase in claims arising out of renewable energy projects as the government continues to invest in them. Technology is evolving quickly, and history tells us that this will inevitably give rise to multiparty claims.

Yamamoto: We expect multiparty construction disputes to increase in the coming years as construction activity resumes and grows both in the Asia-Pacific region and globally. In particular, the push for decarbonisation globally is also likely to contribute to the construction of new renewable energy assets, once again leading to a higher number of multiparty construction disputes down the line. With the general increase in the costs of these projects, the amounts in dispute are also likely to grow, particularly as large-scale construction projects become ever more specialised and complex. It may be possible for disputes of this nature to be resolved more efficiently in the coming years as arbitral institutions adopt faster-track procedures and the parties continue to utilise virtual hearings. CD