

## INTRODUCTION

We start Part 2 of 2020 by remembering Jesse B Grove III, a distinguished colleague and long-time friend of many of us, who passed away in August 2019. He served on the ICLR's Editorial Advisory Board for over three decades and will be greatly missed.

Concurrent delay occupies many of us, both during the life of a project when claims are made and in the world post project if claims are pursued. Abu-Manneh, Helm, Stone and Richter look at how concurrent delay is treated in four different jurisdictions, namely, Brazil, England, Germany and United Arab Emirates. An introductory section provides a thorough analysis of the different approaches taken by these four legal systems and sets out their respective approaches. The article, *Concurrent Analysis of Concurrent Delay*, delves into the real world, taking readers through three hypothetical scenarios involving the construction of three different plants. These are the vehicle for demonstrating on a practical level how the differences in the law and approach of the various courts can impact on entitlement and claims. Interestingly, although the authors comment that the approach of the English court stands apart from the other jurisdictions, the detailed and engaging comparison through these useful examples highlights the very different conclusions which would likely be reached across the relevant jurisdictions. The final conclusion, having travelled through these three exemplar projects, is that parties should seriously consider dealing with the allocation of risk in cases of concurrent delay at the outset, by expressly providing for it in their contracts.

Our next article, *Triple Point Technology – Pointing to Confusion*, addresses one of the two financial claims which usually fall out of delay, the employer's claim for liquidated damages. Cheung considers what happens when a contractor not only culpably delays the work, but refuses to or is seemingly unable to finish the work at all, addressing, and providing a critique of, the recent English Court of Appeal decision in *Triple Point Technology Inc v PTT Public Company Ltd* in which the court considered the employer's entitlement to claim liquidated damages in circumstances of abandonment. Against a backdrop of the contractor's repudiatory breach, having suspended and abandoned the works, the Court of Appeal decided that the liquidated damages provision ceased to apply, such that only general damages were available. This decision is being appealed to the Supreme Court. Cheung's article which was recognised earlier this year as the joint SCL Hudson Prize winner provides a detailed introduction to the case, engages with and challenges the court's conclusions and offers some interesting proposals for reform in this area.

We did not foresee, at the time of identifying contributions for this part, that so much of the globe would be in some form of shutdown when we came

to finalising this part. There is no doubt that the current situation will impact on contractors, and projects, going forward. One challenge will in some cases be solvency. Morris' article, *Australian Contractors, Owners and Banks: Relationships Built on Trust and Security?*, which predates the worldwide Covid-19 virus challenge, addresses Australian trust structures and asks whether they can withstand the competing forces of a principal's statutory and/or contractual set-off rights and financial institutions' proprietary rights under the relevant securities legislation. Morris provides an insightful analysis of proposals to provide better protection of sub-contractor payments in the event of upstream insolvency and concludes with a perspicacious comparison of the approaches adopted in Ontario, Canada and the UK.

Our final article, *PPP – The Keys to Success*, returns to the much debated and much travelled area of academic study, PPP, and discusses the allocation of risk in such projects. Udrescu's focus is on so-called availability-based PPP, defined by Udrescu as where a private party designs finances builds or rebuilds and subsequently operates and maintains the infrastructure, with the public authority paying for the services provided by the private partner (rather than user payment mechanisms). Following an overview, Udrescu delves into the various risks that need to be considered, separating out public sector risks (such as currency risk exchange and inflation), private sector risks (such as design risks, latent defects), and investor risks (such as long stop dates and third-party revenues) as well as shared risks (such as changes in the law and force majeure). This compendious analysis of the risks makes very interesting reading for anyone involved in, or considering involvement in, PPP.

In the casenote for this part, we return to the topic of delay on construction projects and how delay claims should be approached. Stephenson and Hrustanpasic provide a detailed analysis of the recent decision *White Construction Pty Ltd v PBS Holdings Pty Ltd*. The decision of the New South Wales Supreme Court attracted more than usual attention due to the court's rejection of both parties' delay analysis methodologies, relying instead upon the advice of a court appointed expert. The thoughtful commentary on the case by Stephenson and Hrustanpasic emphasises that while the judgment acts as "reality check", this judgment should not detract from a rigorous analysis of the facts combined with a clear and detailed explanation of how delay events impacted on activities. Often the critical question concerns the relationship between delays to activities and incurring cost and the distinction between delay and disruption. An analysis of critical delay to the overall completion date will not necessarily answer the question as to how and why the delay related cost has been incurred.

We conclude with Bell's review of the 14th Edition of *Hudson's Building and Engineering Contracts*.